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PREFACE TO THE TENTH EDITION.

IN preparing the tenth edition of Sir Henry Cunningham's Commentaries of the Indian Evidence Act for publication, I have attempted to notice every recent decision which can in any way be treated as a development of the Code or a fresh illustration of its effect. I have also added to the text a certain number of older cases which may, I hope, be found useful both to the practitioner and the student. The difficulty which has chiefly troubled me has, of course, been what cases to omit, since probably more judicial decisions may be considered as in some degree having a bearing on the Law of Evidence, than on any other similar branch of the Law. I have done my best to meet it by following the example of my predecessors in keeping the contents of this work closely confined to the limits indicated by the Act itself. The changes in the Statute Law relating to evidence since the publication of the last edition of this work have been trifling. Such as they are they have all been duly noticed, with the exception of Act V of 1899, which did not pass through the Legislative Council till the sheets of this book were actually printed. I have noticed English decisions and legislation wherever I have thought them likely to elucidate law or practice in this country.

H. L. STEPHEN.

June 1899.

PREFACE TO THE FIRST EDITION.



THE object of this work is to present in as concise a form as possible such a view of the recently passed Evidence Act as may be intelligible and interesting to law-students and others, who have occasion to make themselves acquainted with that enactment.

However simple in arrangement and comprehensive in detail an Act may be, it cannot supersede the necessity of some previous acquaintance with the subject for which it provides, with the objects and reasons of its requirements, and with the principles on which it proceeds; and though the free use of Illustrations supersedes, to a large degree, the commentator's task, there must still be many points to which a student's attention may be usefully directed, mistakes against which he may be warned, and difficulties in which he may be glad of assistance.

Nothing either in the Introduction or the Notes can lay the least claim to originality. The Introduction is grounded on the Reports of the Select Committee and on the Speeches in the Legislative Council in which, at various stages of the Bill, Mr. Stephen explained its principles and arrangement. In the Notes I have merely endeavoured to explain the connection of one section with another, to clear

up my obscurities of expression, and to point out the respects in which the present measure differs from the English Common Law or from that previously in force in Indian Courts. I have occasionally introduced some of the more familiar English Rulings, whenever it seemed that they would assist in the understanding or application of a section. In the Appendix I have collected a few measures connected with the subject of Judicial Evidence, which legal practitioners may find it convenient to have at hand.

To those who are already acquainted with the subject, I do not presume to offer assistance. They will find nothing in these pages which is not familiar to them. but I venture to hope that the large class of persons, who take up the study of the Law of Evidence for the first time, may find in this volume some assistance in mastering this important Branch of Legal Study.

H. S. C.

MADRAS September 1 1872

PREFACE TO THE NINTH EDITION

IN editing the present edition of *Sir H. Curzon*

The necessary delays arising from printing in India has a work edited in England have prevented the Editor from substituting references to the contents of the Code of Criminal Procedure 1898, for references to previous enactments repealed by that Act. Having regard however, to the nature and form of the new Act it is hoped that this may not cause any serious inconvenience to the reader.

H. L.

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December 1898

LIST OF ABBREVIATIONS.

A. & E.	Adolphus and Ellis Reports.
B. & A.	Barnewall and Adolphus Reports.
B. & Ald.	Barnewall and Alderson's Reports.
B. & C.	Barnewall and Crosswell's Reports.
Beav.	Beavan's Reports.
B. L. R.	Bengal Law Reports.
.. (A. C. J.) Appellate Civil Jurisdiction.
.. App. Appendix.
.. (O. J.) Original Civil Jurisdiction.
.. (Cr. Ap.). Criminal Appeal.
Benj.	Benjamin's Treatise on Sales.
Benth. Rat. Ev. ...	Bentham's Rationale of Evidence.
Best.	Best on the Law of Evidence.
B. & S.	Best and Smith's Reports.
Bing.	Bingham's Reports, Common Pleas.
Bing. N. C.	Bingham's New Cases in the Common Pleas.
Black. Comm.	Blackstone's Commentaries.
Bom. H. C. R. ...	Bombay High Court Reports.
Bom. H. C. R. (A. C.) ..	Bombay High Court Reports, Appellate Civil Jurisdiction.
B. & B.	Broderip and Bingham's Reports.
Broom. L. M.	Broom's Legal Maxims.
C. L. R.	Calcutta Law Reports.
Cal. W. R.	Calcutta Weekly Reporter.
Camp.	Campbell's Reports, Nisi Prius.
C. & K.	Carrington and Kirwan's Reports.
Car. & M.	Carrington and Marshman's Reports.
C. & P.	Carrington and Payne's Reports, Nisi Prius.
C. & F.	Clark and Funnell's Reports, House of Lords.
C. B., N. S.	Common Bench Reports, New Series.
Cox Cr. C.	Cox's Criminal Cases.
Cr. Pr. C.	Criminal Procedure Code.
C. & J.	Crompton and Jarvis's Reports, Exchequer.
C. M. & R.	Crompton, Meeson and Roscoe's Reports.
D. & L.	Dowling and Lowndes's Reports, King's Bench.
East.	East's Term Reports.
E. & B.	Ellis and Blackburne's Reports, Queen's Bench.

Esp.	Espinass's Reports.
Exch.	Exchequer Reports.
F. & F. . . .	Foster and Foulson's Nisi Prius Reports.
Hale P. C. . . .	Hales's Pleas of the Crown.
Hawk. P. C.	Hawkins's Pleas of the Crown.
H. Bl.	Henry Blackstone's Reports, Common Pleas.
H. C. R., N. W. P.	High Court Reports, North-West Provinces.
H. L. C.	House of Lords Cases.
Howe St. Tr. . . .	Howe's State Trials.
H. & C.	Hurlstone and Coltman, Exchequer Reports.
H. & N.	Hurlstone and Norman's Reports, Exchequer.
I. L. R. All. . . .	Indian Law Reports, Allahabad Series.
" Bom.	" Bombay
" Cal.	" Calcutta
" Mad.	" Madras
Irish L. R.	Irish Law Reports.
Jur., N. S.	Justit, New Series.
K. & J.	Kay and Johnson's Reports, Chancery.
Knapp.	Knapp's Reports, Privy Council.
L. J., Q. B.	Law Journal, Queen's Bench.
" C. P.	" Common Pleas.
" Ex.	" Exchequer.
" Pr. & M. . . .	" Probate and Matrimonial.
L. R.	Law Reports.
" Ch. Div.	" Chancery Division.
" C. C. R.	" Crown Cases Reserved.
" C. P.	" Common Pleas.
" C. P. Div.	" Common Pleas Division.
" Eq.	" Equity.
" Ex.	" Exchequer.
" I. A.	" Indian Appeals.
" P. C.	" Privy Council.
" P. & D.	" Probate and Divorce.
Leach	Leach's Cases in Crown Law.
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Macq. H. L. C. . . .	Macqueen's House of Lords Cases.
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M. J.	Madras Justit.
M. & G.	Manning and Granger's Reports, Common Pleas.
M. & Ryd.	Manning and Ryland's Reports, Queen's Bench.
M. & W.	Meeson and Welby's Reports, Exchequer.
M. & Rob.	Moody and Robinson's Reports.
Moore's I. A.	Moore's Indian Appeals.
M. P. C. C.	Moore's Privy Council Cases.
Myr. & C.	Mylne and Craig's Reports, Chancery.

Norton s L. C. ...	Norton's Leading cases in Hindu Law
Peake	Peake's Reports.
Pre. Ch.	Precedents in Chancery.
Q. B., N. S.	Queen's Bench, New Series.
Roscoe	Roscoe's Digest of the Law of Evidence in Criminal Cases.
R. & R.	Russell and Ryan's Crown Cases
R. & M.	Ryan and Moody's Reports
Scott, N. R.	Scott's New Reports, Common Pleas
Sim	Simon's Reports, Chancery.
Smith s L. C.....	Smith's Leading Cases
Stark. N. P. C. ...	Starkie's Reports, Nisi Prius.
Steph. Dig	Stephen's Digest of the Law of Evidence, 1851.
Suth. W. R.	Sutherland's Weekly Reporter
Suth. W.R. (Cr.C)	" " " Criminal Cases.
" " (Cr. R)	" " " Criminal Rulings.
Swans	Swanston's Reports, Chancery
S. & S.....	Simon's and Stuart's Reports, Chancery
Taunt	Taunton's Reports, Common Pleas
Tayl.....	Taylor on Evidence
T. R.....	Term Reports.
Ves. (Jun.).....	Vesey's Junior Reports, Chancery.
Ves. (Sen.).....	Vesey's Senior Reports, Chancery.
W. R.	Weekly Reporter
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Williams on Exors	Williams on Executors and Administrators
Wym. Cr.	Wyman's Reports, Criminal.
Y. & C.....	Younge and Collier's Reports.

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SCHEDULE.

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The following alterations should be made in the text in order to incorporate the provisions of the Indian Evidence Act, 1899, Act V of 1899, with previous legislation —

To section 37 of the Act of 1872 p. 180 add “This section applies also to any Act of the Lieutenant-Governor in Council of the North-Western Provinces and Oudh, the Punjab or Burma.”

In section 45 of the Act of 1872, as amended by section 4 of the Indian Evidence Act Amendment Act (p. 192) after the word “handwriting,” in each of the two places where it occurs, add “or finger-impressions”

To section 73 of the Act of 1872 (p. 229) add “This section applies also, with any necessary modifications, to finger-impressions”

In section 86 of the Act of 1872 as amended by section 8 of the Indian Evidence Act (1872) Amendment Act, 1891 (p. 240) for the second paragraph, substitute the following :—

“An officer who, with respect to any territory or place not forming part of Her Majesty's dominions, is a Political Agent therefor, as defined in section 3, clause (40), of the General Clauses Act, 1897 (X of 1897), shall, for the purposes of this section, be deemed to be a representative of the Government of India in and for the country comprising that territory or place.”

In section 8 of the Indian Evidence Act (1872), Amendment Act 1891, take out from “and to the same” to the end of the section

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INTRODUCTION

1. THE object of every judicial inquiry is to produce in the mind of the Judge Jury or other deciding authority, a belief as to the existence or non-existence of certain facts, on which the rights or liabilities of the parties and the decision of the case depend

Object of judicial inquiries

2. This belief is produced by presenting to the Judge's mind various facts, which constitute the material out of which his belief is to be formed. The Judge examines these various facts and the grounds on which he is asked to believe them; weighs those, which are contradictory, against one another; estimates the corroborative effect of those which confirm one another; and decides at last which of them he wholly believes or disbelieves, which of them he considers partially true, which of them he thinks so doubtful that they ought to be disregarded, what are the inferences suggested by those which he considers true, and what, upon the whole, he believes about the matter.

How is belief produced?

3. For instance, a corpse, with an incised wound in it, is found. A and B say that they saw C stab the man whose corpse it is: D and E say that at the time C was asleep in their house; F says that he sold a dagger, fitting the wound to C the day before; G says that the dagger was sold to some one else; the footmarks at the scene of the murder correspond with C's: C, on being questioned as to his absence from home, prevaricates; his clothes are bloody; there was a feud between his family and that of the deceased; there had been a quarrel, &c., &c. Now the object of a Trial is to place all this material before the mind of the deciding authority—Judge or Jury—and give each part of

Illustration.

it its proper weight. How much importance is to be given to A and B's statement, how much to that of D and E? which is telling the truth, F or G? Supposing the evidence as to the dagger, the footmarks and C's absence from home, and his prevarication in explaining it, the family feud, &c, to be true, what is the inference to be drawn from them as to his guilt? The result of this process is the Judge's or Jury's belief.

Difficulty of
forming belief
in judicial
cases

4. This process of forming a belief in judicial cases is often very difficult and unsatisfactory. The degree of certainty attainable is not a high one. It always falls short of the absolute certainty attained by mathematical demonstration, and even of that high degree of certainty reached in scientific inquiries by means of experiment, comparison and other processes. A chemist, who suspects that a particular combination of substances produces some result, or that a disease may be imparted or cured in some particular manner, can go on experimenting till he arrives at a degree of certainty so high as to amount to demonstration. A geologist, who suspects that certain formations have been produced by some particular physical causes, can look to other countries or places where the same physical causes have existed, or where, perhaps, they are, at present, at work. A surgeon, who wants to be sure that one nerve has to do with sensation and one with movement, can pursue his investigations and experiments until he has made sure. No such resource is available in judicial inquiries. It is on a certain limited number of facts that the conclusion must be based; and these facts are often too few and too untrustworthy to form a sound basis for conviction. A judicial inquiry, accordingly, is, as compared with a scientific inquiry, a very rough process; the risk of error is considerable, and the degree of certainty arrived at by it is scarcely ever such as would justify a man of science in saying that a thing was proved. The utmost that can be attained in a judicial case is the independent testimony of respectable and disinterested witnesses, speaking of their own know-

ledge, and corroborated by circumstances which make it probable that they are telling the truth. But the most respectable and independent witness may be deceived, and the witnesses, with whom a Judge has to deal are, in many instances, neither respectable nor disinterested. On the other hand, surrounding circumstances may happen in such a way as to be most treacherous guides, as occasional stories of the miscarriage of Justice, occasioned the production of trustworthy but incomplete evidence, sufficiently demonstrate. In many cases, moreover, there are no corroborative circumstances, and the Judge has to pick out the truth from the statements of people, who, he knows, are trying to deceive him. In such cases his belief is scarcely more than the adoption of one of two conflicting improbabilities. He may have to say to the parties A and B, "Both of you have been lying. Both your stories are improbable, but on the whole, I think, that A's is the least unlikely, and I, therefore, decide in his favour."

5. Still, however low be the degree of certainty attainable, a decision, one way or the other, must be forthwith come to. Here, again, judicial inquiries differ from scientific. The man of science constantly comes to the conclusion that sufficient material for an opinion is not available, and that his judgment must remain in suspense. His only knowledge about a particular subject is that he does not, and, with his existing means, cannot know positively about it; he remains therefore without coming to any conclusion. But this the Judge cannot do. One way or other a decision has to be given. If he acquits a man accused of murder, he takes the responsibility of letting a crime (if crime there has been) go unpunished, and turning a criminal loose on society; if he decides in favor of the defendant, because the plaintiff has not made out his case strongly enough, he takes the responsibility of keeping a man out of what may be his rights. A Judge must always decide something, and he must often do so on grounds which are very insufficient for a sound opinion.

A decision
must be ar-
rived at.

What degree of probability is essential to belief.

Verdict of a Jury.

In India the Judge to decide.

Limited scope of a Law of Evidence.

6. Such being the Judge's position, what amount of certainty, or, to speak with exactness, what degree of probability is he to regard as justifying the state of mind known as belief? The answer to this question is given in England by the extremely rough method of locking twelve average and presumably disinterested men into a room and obliging them by various stringent rules to come forthwith to a conclusion. For the purposes of an English trial, accordingly, a thing is "proved" when twelve average citizens, chosen by lot, can be induced, under the various conditions affecting trials by Jury, to come to a unanimous decision about it.

7. In India, except in the case of criminal trials by Jury, the Judge has the responsibility of deciding on the facts of the case thrown upon him. He must decide, in each instance, for himself whether the existence of the fact is "so probable that a prudent man ought, under the circumstances, to act upon the supposition of its existence," in which case he may treat it as proved; or "so improbable that a prudent man ought, under the circumstances, to act on the supposition that it does not exist," in which case he may treat it as disproved. What that degree of probability is in each case is a question which the law cannot decide for him. The decision of this must depend on his own good sense, good judgment, insight and experience. There is another result, which the facts may justify, and on which a Judge often has to act, *viz.*, that a thing is neither proved nor disproved. In this case the Judge will, ordinarily, act, on the assumption of its non-existence.

8. The mode in which this process of inference can be best conducted and the proper rules for its conduct are subjects of far wider bearing than anything with which the Law of Evidence has to do. They are, in fact, co-extensive with the laws of Logic and inference in their widest and highest sense. The human understanding varies indefinitely in its efficiency as an instrument for arriving at the truth, from the blundering conjectures of the ignorant

savage to the exhaustive investigation, elaborate analysis and wide-reaching generalization of a Newton or a Darwin. These different degrees of efficiency can be affected but to a small extent by any artificial rules of inquiry. To be able to observe correctly, with real insight, to weigh conflicting evidence with a just appreciation, to form a wise judgment out of a confused and perplexing mass of contradictory facts, is among the highest of intellectual attainments, and one which no formal directions can do more than partially assist. All that the Law of Evidence can do is to lay down certain general principles as to the material out of which belief is to be formed, and the mode in which that material of belief is to be brought before the Judge's mind. How that material is to be employed by the Judge and to what effect, are questions of a perfectly different and very much more important character. Those who have occasion to make use of a Law of Evidence should, accordingly, be on their guard against attributing undue value to it as an instrument for the discovery of truth. The fact is that it is only when the facts have been duly marshalled according to a Law of Evidence that the really difficult portion of the Judge's task begins. It may be feared that more attention is sometimes paid to the technicalities which govern the admission of particular pieces of evidence than to the really essential portions of a judicial inquiry, *viz.*, the true significance of the various facts of the case, read by the light of one another, and the general result to which they point. After all, a Law of Evidence is but means to an end, and it is infinitely more important that a Judge should decide aright than that he should be minutely and technically correct in the grounds of his decision.

9. The discovery of truth, both in criminal and civil cases, is a matter of such extreme interest to society that public attention has been directed to it from the earliest times; and the laws of every country bear testimony to the prominent place it has ever occupied in the minds of rulers.

The law has at all times interested itself in the discovery of the truth.

Indeed till rights can be, to some extent, ascertained and enforced, and crimes discovered and punished, society can scarcely be said to exist

Modes in
which the law
assisted in
the discovery
of truth

10 In the ruder stages of society the law supplied various devices for the discovery of disputed facts which seem to us merely foolish or grotesque. Men, between whom any matter was in dispute, were put to fight each other, or to submit to various ordeals by which, it was superstitiously supposed, the real facts of the case would be revealed. Such tests are, it is needless to say, the worst possible device for finding out the truth. The terror inspired by them may occasionally induce a guilty person to confess; but they act with equal force on the minds of the innocent, and, in unscrupulous hands, are ready instruments for fraud, imposture and cruelty. They all rest on the assumption that some unseen power can and will interfere with the ordinary course of nature for the purpose of indicating the truth in some particular case. The civilized portions of the human race are now satisfied that no grounds for such an assumption exist; and these irrational devices have, happily, passed away.

Torture

11. Another barbarous contrivance for getting at the truth, which the law of England at one time countenanced, was torture. This method was, no doubt, in many instances efficacious. It was practised up to a comparatively recent period of English history, and the utmost efforts of the Government have not succeeded in preventing recourse being still occasionally had to it in India. The objections to it are its brutality, its injustice, and the danger of leaving so powerful an implement of oppression in the hands of officials who are very likely to use it oppressively. It is, moreover, a most fallacious guide, as innocent wretches, in the throes of agony, have been frequently known to admit anything for the sake of immediate relief, while guilty men, when strong motives for silence exist, have resisted every attempt of their tormentors to induce a confession. The law has now definitely abandoned it as a means of

discovering the truth, and has taken extraordinary precautions against its employment by the Police, whose duties might be likely to tempt them to make use of it.

12. Another expedient, and one which, in certain primitive stages of society, was probably the best available, was to constitute a tribunal of notables who might from their position, be presumed to be well-informed and impartial, and to confide to them the duty of adjudication, leaving aside altogether the question of the evidence on which each man's knowledge of the facts was based. Such a tribunal of notables was the ancient English Jury, and such are the assemblies of village headmen and others, which in parts of India still decide questions of local interest, or, to speak more exactly, give formal expression to the belief of the entire community. For it is obvious that such institutions can be tolerably efficient only so long as the structure of society remains so simple, and the habits of mankind so primitive that information possessed by one portion of the community speedily becomes public property. When a murder is committed in a frontier village, it is certain that there immediately comes into existence a self-generated public opinion on the subject, which is more likely to be true than anything which the most elaborate machinery, applied from without, could arrive at. This is because the inhabitants of a frontier village live in such complete community of ideas and in such constant, immediate and unrestricted intercourse with one another that a piece of information or a belief runs at once through the entire body, and cannot, for any length of time, remain the monopoly of an individual. But then the human race has, for the most part, passed beyond the stage of frontier villages, and formal provisions have to be made for ascertaining facts in the discovery and adjudication of which society or individuals have an interest. Hence arise regularly constituted judicial tribunals, and the rules by which, in various countries and ages, these tribunals have been guided and controlled, —in other words, the laws of procedure and evidence.

Tribunal of
No dues

Exclusion of
witnesses,

13. Many of these rules have been, after prolonged experience and discussion, discarded as unsound. Foremost among these are those which in former times resulted in the exclusion of particular classes of witnesses. Race, creed, profession, social position, sex, age, special diseases or bodily defects, interest in the matters in dispute, relationship to the parties concerned, have all, at different times, been regarded as grounds for disabling person from giving evidence. The propriety of such disabilities was long and hotly contested. The assailants of the system of exclusion pointed out that any rule of exclusion must often shut out witnesses whose evidence would be in the highest degree important and trustworthy ; that it must be for the interest of justice that the truth, by whomsoever spoken, should be known, and that the reasonable thing to do with evidence coming from a suspicious quarter, is, not to exclude it, but to take it for what it is worth.

This doctrine gradually gained way : one ground of disability, after another disappeared ; and it is now only in a very few and very exceptional cases that any person is, according to English law, disqualified from giving evidence.

In India, where the functions of Judge and Jury are almost invariably united, the unreasonableness of excluding any evidence was still more apparent, as the Judge is presumably a person skilled in dealing with testimony, acquainted with the springs of human conduct, and more capable than a Jury of allowing to each person's statement its due weight and no more. In England, it may be contended, certain evidence is excluded, not because it is worthless, but because Juries generally cannot be trusted to make a proper use of it, and, therefore, the only thing to do is to keep it away from them altogether. When the functions of Judge and Jury are combined in a single person such evidence may safely be admitted for what it is worth. Accordingly, by the law of India as it now stands, every person, capable of understanding the questions put to him and of giving rational answers, is allowed to give

INTRODUCTION.

evidence, whatever be his position or antecedents, his relation to the parties concerned or his interest in the result of the proceedings. Even accused persons are allowed to make statements and to be examined by the Court, though the untrustworthy nature of statements made under such circumstances is emphasized by their exclusion from the definition of "Evidence," and by the prohibition of the solemnity of an oath or affirmation. The present Act has carried this principle to its utmost length by providing in Section 30, that, where persons are being jointly tried, a confession by one of them, affecting himself and others of the accused, "may be taken into consideration" as against the co-accused, as well as against himself. This has been objected to as dangerous; but a little consideration will show that, inasmuch as it is practically impossible to prevent such a confession having some effect on a Judge's mind, the safer course is to recognise this necessity, to sanction his taking it into consideration, and to remind him at the same time how slight that consideration ought to be.

14. At the present day one of the most important ways in which the law assists in the discovery of the truth in judicial proceedings is by making arrangements beforehand for the preparation and preservation of especially good evidence, so that, if ever a dispute arise, the most trustworthy material for settling it will be ready to hand. This is what is done by the careful and elaborate record of title to land, the formation, maintenance, and correction of which forms so marked a feature of our land-revenue system. Whenever a dispute about land, succession, inheritance or family custom arises, the law has provided the means of obtaining the most authentic evidence on the subject. It is easy to see how enormous a help to the ascertainment of the truth and to the cause of justice is thus given, and how great a public loss is sustained wherever no such record exists, or, through the neglect of its custodians, it is allowed to become inaccurate or incomplete.

Provision of
Evidence be-
forehand.

Record of
Title.

Registration

15. The same result is effected by the Registration Act, by which any person, interested in a document, has the means, at a small outlay, of placing its authenticity beyond dispute, and, so far, arming himself with incontestably good evidence, should a dispute about it ever arise. With a view to increase the beneficial effects of Registration, the law provides that, in the case of the more important classes of documents, notably in every instance where immovable property is affected, it shall be compulsory. In other words it will not leave it to the discretion of parties to provide themselves with this superior order of evidence, or not, as they please ; but, in their own interest and that of society at large, compels them in every instance to do so.

The compulsory Registration of transfers of immovable property is, it has been pointed out by Sir Henry Maine, the natural and proper substitute for the ceremonial formalities by which, in earlier conditions of society, the sale or gift of land was invariably attended.

Writing some-
times obliga-
tory.

16. With a view to the same object, the law obliges people, in certain important transactions, to record the matter in writing, and, in some cases, to add the further security of attestation. Thus, in cases to which the Indian Succession Act applies, a testamentary act can be proved only by a properly signed and attested document. The Transfer of Property Act, again, requires sales, mortgages and leases of immovable property to be in writing. So, too, an acknowledgment of indebtedness, in order to take a case out of the operation of the Limitation Law, must be in writing and signed. On the same principle the policy of the various Rent Laws has always been in favor of written leases and receipts. The object of these provisions is to compel people to resort to the safest possible methods of recording their intentions, and so to facilitate the discovery of truth, should the matter ever come into dispute.

Declaratory
Decrees

17. Under the same heading may be placed the provision of the Specific Relief Act, I of 1877, for declaratory decrees. Section 42 of that Act enacts that " any person entitled to

any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief." Here we have the system of providing evidence beforehand carried to its utmost length, the law allowing a person, under the prescribed conditions, to set the Courts in motion, for the purpose, not of putting him in possession of his rights, but of merely ascertaining and declaring them with a view to their possible enforcement or protection on some subsequent occasion.

18. The same object is effected by the suits for the perpetuation of testimony. by which, in England, when a person has reason to believe that the testimony of some other person, which is of importance to him, is not likely, at a later period, to be available, he can get that evidence recorded with all the safeguards and solemnity incidental to a judicial proceeding.

Suit for perpetuation of testimony.

19. Again, the law assists materially in the discovery of the truth by putting stringent compulsion upon any one, who knows about a matter under inquiry, to speak and to speak the truth. It compels witnesses to come to Court, to answer questions, to produce documents; and it makes the refusal to speak, or falsehood in speaking, a punishable offence, as well as, in civil cases, an actionable wrong. Moreover, with a view to increase the chances of truthfulness, the law, in former times, obliged witnesses, and it still allows them, to appeal to the sanction of religion, and to imprecate the displeasure of the Deity upon themselves, if they are not telling the truth. It further enables the party to a dispute to make use of any oath, which is considered especially binding by persons of his race or persuasion, so long as it is not offensive and does not purport to affect another person. A party may also offer to be bound by such an oath, if the opposite party will take it. Thus the law utilizes whatever incentive to truth-telling,

The legal obligation to speak the truth.

religion or superstition in any case can be supposed to give: and it brings an earthly incentive into play by punishing with heavy penalty any false statement.

Oaths not now
compulsory.

20. The tendency of opinion of late years has been against the efficiency of oaths as a means of inducing truth-telling, at any rate against the propriety of making an oath essential to the validity of testimony. Various degrees of relief were from time to time afforded to those whose consciences were offended by an oath. As long ago as 1840, Hindus and Muhammadans were exempted from taking certain oaths, which were considered objectionable, and a solemn affirmation was substituted for an oath. A similar indulgence is now extended in England to any person who states that taking an oath is contrary to his religious belief. As the law now stands in British India, Hindus and Muhammadans affirm, and all other persons swear, in such form as is, from time to time, prescribed by the several High Courts. Any person, however, may, without assigning a reason, object to take an oath, and may, instead, make an affirmation of the facts which he wishes to state to the Court. The diminishing importance attributed by the Legislature to oaths as an instrument for securing truthful evidence is shown by the provision of the Act which now regulates the subject, that no omission or irregularity as regards the oath or affirmation of a witness shall affect the admissibility of his evidence or his obligation to speak the truth or the validity of any proceeding. The legal obligation, however, of a witness to tell the truth rests not on the oath but on statutory enactment. The Oaths Act (X of 1873), Sec. 14, expressly enacts that witnesses "shall be bound to state the truth," and the Indian Penal Code, Secs. 191 and 193, renders punishable the giving of false evidence by any person "legally bound by an oath or by any express provision of law to tell the truth."

Law of Evi-
dence connect-
ed with that of
Procedure.

21. The Law of Evidence is so essentially connected with that of Procedure, that various provisions of the Procedure Codes are really neither more nor less than rules of

Evidence, and might with equal propriety be inserted in an Evidence Act. Such, for instance, is the rule in the Code of Civil Procedure, which requires that all documents relied on in a case must be produced at the first hearing; the object of which is, obviously, to prevent evidence being manufactured as the case goes on. Such, again, are the provisions in the Code of Criminal Procedure as to the mode in which a witness' testimony and the accused's statement shall be recorded; as to the admissibility of depositions made at an earlier stage of the proceedings and the use that may be made of them; as to the mode in which a Civil Surgeon's statement may be proved, or evidence may be taken by commission in certain cases.

22. The most important of the rules affecting Evidence in Indian Courts were, up to the passing of the Indian Evidence Act in 1872, to be found in the decisions of the English Courts, laying down the English Common Law on the subject, and in the text-books in which these decisions were collected and discussed. The native rules of evidence had silently, but not less completely, disappeared. Several Acts of the Indian Legislature, passed from time to time, had introduced portions of the English Law or modified its provisions in certain particulars; but they did not profess to set forth generally what the English Law was; and no complete or systematic enactment on the subject had, up to 1872, found a place in the Indian Statute Book. This gap in the substantive law of the country was filled by the Indian Evidence Act of that year.

23. The structure of the Act will be best understood by observing that it is divided into two principal divisions, which may be summarized by saying that they settle

(I.) what is the permissible material of belief,—in other words, what facts are relevant and may be proved; and

(II.) in what way each of the facts constituting that material is to be proved:

This second division comprises Parts II and III of the

English Com
mon La

Arrangement
of the Act.

Act ; Part II dealing with the general principles governing "Proof," such as the rules as to oral and documentary evidence and the cases in which the one is excluded by the other ; and Part III dealing (1) with the persons, who are bound to supply this evidence,—on whom, in other words, the burthen of proof lies, and (2) the procedure according to which they must supply it,—in other words, the rules governing the examination of witnesses.

This division of the subject into the substantive part that deals with the material of belief, and the formal part which deals with the manner in which that material may be proved, is the main principle on which the Act is arranged, and unless it is thoroughly understood and kept in sight throughout, the system of the whole will be unintelligible.

Evidence of
facts in issue
may be given
Sec. 5.

24. The matter may be stated more fully thus: The production of a belief in the existence or non-existence of certain facts being, as we have seen, the object of every judicial inquiry, and belief in the existence of a fact being the result of a mental process on certain materials presented to the mind, the first thing to be decided is, what are those materials to be? In the first place, evidence of the actual facts in issue is admissible. Where the issue is whether a thing happened, the simplest way of producing belief in its occurrence is for some one, who is able to assert of his own knowledge, from the evidence of his own senses, that it did happen, to come into Court and say so. The only question which the Judge has then to settle is as to the degree in which the witness' account can be trusted. If the witness was not deceived as to what his senses told him, if he remembers it accurately, and if he is telling the truth, his testimony establishes the fact to which he speaks. Supposing, for instance, the fact in issue to be, "Did A kill B?" Witness, "I saw A take a knife and stab B in the heart, and B fell back dead." Here the only questions are, was the witness deceived as to what he saw, is his recollection inaccurate, is he lying? If not, the fact must be as he says

25. But, secondly, there are, surrounding every fact, a number of other facts which bear upon it, are connected with it more or less intimately, and in a higher or lower degree affect its probability. They are not facts in issue, that is facts on which the rights and liabilities of the parties immediately depend, but they are facts from which facts in issue may be inferred. Now almost every fact may, in the concatenation of human affairs, be shown to be in some way or other connected with another; but the attempt to follow out in every instance, every remote connection would not only render judicial inquiry impossible from its interminable length, but would, even if practicable, be a very doubtful help towards the discovery of the truth, because the mind would be diverted from the immediate subject of inquiry. One of the main uses, accordingly, of a Law of Evidence is to give a definition of the sort of connection which must exist between two facts in order that the one may be taken into account in forming a belief about the other, or, in other words, may be "relevant" to the other. Sir James Stephen* has given a general description of "relevancy" by saying that one "fact is relevant to another fact when the existence " of the one can be shown to be the cause or one of the " causes, or the effect or one of the effects, of the existence of the other, or when the existence of the one, either " alone or together with other facts, renders the existence of the other highly probable or improbable, according to the common course of events." This description, it will be seen, makes "relevancy" of facts to one another depend either (1) on their connection with one another as cause and effect, or (2), generally, on the existence of the one rendering the existence of the other "highly probable or improbable." This latter form of connection is obviously too wide and too vague to be of practical use. Ingenious attempts have been made to analyze the true essentials of "relevancy;" but it is unnecessary for our present purpose to consider them, because the Act has laid down

Relevant facts
Sec. 6-55

* Digest of the Law of Evidence, 4th edition, p. xii.

in explicit terms the forms of connection between facts which it will recognize as rendering them relevant to one another. These we shall examine hereafter. At present it is enough to point out that these "relevant" facts constitute what English text-books call "circumstantial evidence," as opposed to evidence of the actual facts in issue. They are, in every instance, an important auxiliary to, and check upon, direct evidence of the facts in issue, and when plentiful enough, and strong enough, they may supersede it altogether.

26. With facts of this character, however, the Judge has a two-fold process to perform ; first, as with the other class, he has to decide on the accuracy and truthfulness of the witness ; and then, assuming the accuracy and truthfulness of the witness, he has to decide on the proper inference to be drawn from the fact stated. Suppose, for instance, the fact in issue to be, " did A kill B ? " and the evidence to be as follows : " A came running out of the house ; he was much excited and splashed with blood ; in his hand was a bloody knife ; all the doors were locked but that out of which A came ; no one else was in the house ; B was lying on the floor with her hands tied behind her and her throat cut." Now in this case there is no direct evidence of the fact in issue, *viz.*, whether A killed B ; that is there is no one who can speak to it from the direct evidence of his senses. What we have are facts from which the fact in issue may be inferred, and the Judge has to decide, first, whether the witness is telling the truth, and, secondly, if he is telling the truth, what is the proper inference to be drawn from the facts stated. Assuming all that the witness says to be true, does it prove that A killed B ?

Circumstantial
evidence

27. Great emphasis has been laid on the distinction between these two classes of evidence, direct and circumstantial, and it has sometimes been urged that it is never safe to trust to circumstantial evidence in the entire absence of direct ; in other words, that unless there is some one who is in a position to assert directly of his own knowledge

derived from his own senses, that the fact in issue did happen, no amount of circumstantial evidence will justify the inference that it has happened.

But this is obviously going too far. There are many crimes which are committed under circumstances that preclude the possibility of direct evidence of their commission being given, but which yet allow of a perfectly safe inference being drawn from surrounding circumstances. A house is broken into and a golden cup stolen : ten minutes after, a man is caught with implements of house-breaking in one pocket and the cup in another : he can give no account of them or himself : he is shown not to have had any gold cup in his possession shortly before the occurrence : he has been previously convicted of house-breaking : duplicates of pawned property, proved to have been stolen, are found upon him. The combined result of these various facts is to make his guilt just as certain as if twenty witnesses came and swore that they saw him do it. Stories are often told of the mistakes to which circumstantial evidence, apparently of the most conclusive kind, has given rise. But the occurrence of such accidents proves nothing but that all judicial decisions, however arrived at, are liable to error ; and that all that can be done is to act as in each instance appears most reasonable. Just as many stories might be told of convictions based on direct evidence, which has afterwards proved to be false. If "circumstances" sometimes "lie," *i.e.*, so happen as to suggest a deceptive inference, how much oftener is a Judge led astray by the inaccuracy or fraud of witnesses in testifying to a fact in issue. In India, at any rate, it is more to the surrounding facts than to evidence given directly on a fact in issue that a Judge will look to ascertain the truth.

28. It has been sometimes laid down by way of restricting the effects of circumstantial evidence in the absence of direct evidence, that, in criminal cases, the "*corpus delicti*," that is, the fact that a crime has been committed, at any rate, should be proved by immediate evidence, not simply

be inferred from the surrounding circumstances. If a man is to be convicted of murder on circumstantial evidence, the fact of the deceased having come to a violent end should, according to this doctrine, be proved by direct evidence, as by the evidence of some one who inspected the corpse. If a man is to be convicted of theft on the strength of circumstantial evidence, it should first be proved by direct evidence that some one has been robbed. Great authorities may be quoted in support of this doctrine; but its unsoundness was demonstrated by Bentham, who pointed out that any such rule would merely have the effect of allowing murders to be committed with impunity in every case in which the victim's body could be successfully made away with so as to render proof of the murder by direct evidence impossible. And so with every other crime. The fact is that it is in vain to invest any one of the facts of the case with an artificial value and insist upon it as essential in every case to a conviction. It is easy to imagine cases in which the *corpus delicti*, i.e., the fact of the crime, was not directly proved, but yet in which the prisoner's guilt would be beyond all reasonable doubt, and in which it would accordingly imply the grossest timidity to shrink from convicting. On the other hand, even supposing the *corpus delicti* to be directly proved, its proof disposes of only one of various hypotheses, on any one of which the prisoner's innocence might be inferred, and all of which must be shown to be untrue before a conviction can be justified. The fact that the deceased came to a violent end is, in such a case, proved; but a great many other facts must be proved before any one can be convicted of having murdered him; and there seems no reason why the one fact should necessarily be proved in a different way from that in which the others are proved.

Which of the surrounding facts are to be considered relevant?

29. But then the question arises, to which of the surrounding facts is a judge to look, and where is he to stop? over how large an area of surrounding circumstances is his mind to travel in coming to a belief as to the fact in issue?

Which of these surrounding circumstances is he to take into account, which is he to ignore? Some of them will affect the probability of the fact in issue in a high degree: some in a lower, but still appreciable degree: some in so low a degree as not to be worth notice.

Suppose, for instance, that A is prosecuted for the murder of B, and the surrounding circumstances to be these: 1), A is seen by C and D standing over B's corpse with a bloody knife in his hand, the blade of which exactly fits the wound in B's body; (2), he was known to have a violent grudge against B and to have threatened to kill him; (3), he was so circumstanced that B's death was of material advantage to him; (4), he was seen by one man going towards the scene of the murder shortly before its occurrence, and by another coming away shortly afterwards; (5), he left the village the evening of the murder having previously burnt his clothes; (6), he was of a hostile clan to B; (7), he was a man of notorious evil life; (8), he had previously been convicted of crimes of violence; (9), he was of a surly, passionate and violent disposition and unpopular in his village; (10) there was a rumour that he had done it; (11), the general feeling in the village was that he was the guilty man; (12), somebody told somebody else that he believed A to be the murderer; (13), A's father exhibited a homicidal tendency. Here are facts ranging in every degree of importance in their bearing on the facts in issue, from the very highest to the very lowest. Some of them, if true, produce a feeling almost of certainty; some, coupled with others, raise a strong presumption; some again, though not by themselves of great importance, do, when coupled with others, materially affect the probability of the case; some on the other hand, as, *e.g.*, 9, 10, 11, 12 and 13, suggest a probability so faint that it is more likely to lead one wrong than right, and ought, therefore, to be put aside altogether. Where is the line to be drawn? For a line must be drawn somewhere. "The Laws of evidence," said Lord Cranworth, "are founded on a compound consideration of what,

abstractedly considered, is calculated to throw light on the subject in dispute, and what is practicable." On the one hand, we want to discover the truth; on the other hand, since human life is short, and human powers are limited, we can devote only a limited amount of time and labour to its discovery. It is necessary, therefore, to prescribe a definite area, beyond which our investigations shall not extend. The facts which fall within that area are styled "relevant," and it is out of these and these alone that the Judge's belief about the matter must be formed. These alone can be proved. What then are the rules for testing whether a fact is relevant or not? The answer to this question is given in Chapter II of the Act, Sections 5—55.

Meaning of the word "fact."

30. But, first, what is the meaning of a "Fact." "Fact" is defined as meaning; (1), "anything, state of things, or relation of things, capable of being perceived by the senses; (2), any mental condition of which any person is conscious." "Fact" will, therefore include acts and events that can be perceived by the sense of sight,—statements which can be perceived by the sense of hearing,—opinions, feelings and beliefs of which the mind is conscious. We shall see presently that statements, opinions, feelings and beliefs are often relevant facts of the highest importance.

Arrangement of relevant facts.

31. In forming an opinion about a fact one would naturally consider.

- 1st.—Anything which has happened or been done in connection with it,
- 2nd.—Anything which has been said about it,
- 3rd.—Anything that has been decreed in Courts of Justice about it,
- 4th.—Anything that has been or is thought about it. and
- 5th.—The character and reputation of parties concerned.

Under these five headings, accordingly, all relevant facts have been arranged in the Act. Under some one of them

every fact, which claims to be relevant, must be shown to fall. Many relevant facts, moreover, will fall under more than one of them, as the headings are inclusive and not exclusive of one another.

32. First then as to things which have happened or been done in connection with the fact to be proved, we have in Sections 6--16 an enumeration of the particular forms of connection which the law regards as constituting relevancy. A fact is said to be relevant if it is so connected with a fact in issue as to form part of the same transaction, whether it happened at the same or at a different time or place, Sec. 6; if it is the occasion, cause or effect, immediate or otherwise, of a fact in issue or relevant fact; or constitutes the state of things under which such a fact happened, or affords an opportunity for the occurrence of a fact in issue or relevant fact, Sec. 7. So, also, facts showing motive or preparation for a fact in issue or relevant fact; previous or subsequent conduct of the parties; statements of the parties which accompany and explain conduct; statements, made to or in the presence of the parties, which affect their conduct, Sec. 8; so, also, are facts necessary to explain or introduce a fact in issue or relevant fact, or which rebut an inference suggested by such a fact, or which establish the identity of any thing or person, whose identity is relevant, or fix the time or place at which any fact, in issue or relevant, happened, or which show the relation of parties by whom any such fact was transacted, Sec. 9; all acts and statements of conspirators in connection with, or explanation of, the conspiracy, Sec. 10; facts that are inconsistent with relevant fact or fact in issue, or which render any such fact highly probable or improbable, Sec. 11; or which enable the Court to determine the amount of damages when damages are claimed, Sec. 12; so too, when the enquiry is as to a right or custom, any transaction by which, and any particular instance in which such right or custom was created, claimed, modified, recognized, asserted or denied, exercised, disputed or departed from, is a relevant fact,

Acts and
events when
relevant facts.
Secs. 6--16

Sec. 13 ; so, also, are facts showing the existence of a state of mind or body when such state of body or mind is relevant, Sec. 14. Again, when the question is whether an act was accidental or intentional, the fact that it formed part of a series of similar occurrences, is relevant, Sec. 15 ; and so is the course of business according to which the act, as to which the enquiry is, would have been done, Sec. 16. Anything which falls within this category is a relevant fact.

Statements
when relevant
facts,
Secs. 17—39.

33. The next class of relevant facts are certain statements ; (Sections 17—39.) As a general rule the mere fact that some one has previously said something about the fact to be proved is not a relevant fact ; but there are certain conditions under which previous statements have a most important bearing on the probabilities of the case, and are almost the best evidence that a Court can have. Everything depends on the person by whom and the circumstances in which the statement is made.

Admissions.
Secs. 17—20.

34 The first kind of statements to be considered are admissions. An admission is defined to be any statement, which suggests an inference as to a fact in issue or relevant fact, made by

By whom a
statement
must be made
in order to be
an admission.

- (a) a party to the proceeding ;
- (b) an agent to such party, duly authorised ;
- (c) a person, who has a proprietary or pecuniary interest in the subject-matter of the suit, and who makes the statement in the character of a person so interested ;
- (d) a person from whom the parties to the suit have derived their interest ;
- (e) a person, whose position it is necessary to prove in a suit, when the statement would be relevant in a suit brought by or against himself ;
- (f) a person, to whom a party in the suit has expressly referred for information.

When state-
ment must be
made in order
to be an admis-
sion.

In order, however, for the statement, to be an admission, it is further necessary, as to (a), in the case of persons suing or sued in a representative capacity, that the state-

ment should have been made during the continuance of their representative character, and in the cases (*c*), (*d*), (*e*), that the statement should have been made during the continuance of the interest or position as to which the statement is made.

35. The peculiarity of an admission is that it is relevant as against the person who makes it or his representative in interest, but not relevant, except in certain specified cases, on his or his representative's behalf. The reason of this is obvious. If A sues B for Rs. 50, the fact that B told some one else that he owed A the money, is a weighty piece of evidence as against B. He has every incentive not to make such a statement, and it is nearly certain that he would not have made it unless it were true. On the other hand, suppose that A has said "B is not longer my debtor," that, for the same reason, is a weighty piece of evidence, against A, and, supposing its authenticity to be established, its importance can hardly be overrated in considering the question of A's claim. For who is so likely to know about the claim as himself, and who is so little likely to understate it? But the fact that A has told some one that B owes him the money, or that B has denied the existence of the debt, is of no weight at all, because each, of course, makes the best of his case, and each, if such statements were admissible, would be tempted to manufacture evidence in his own behalf. It is clear that the fact that A asserted or B denied the debt, on any number of occasions, does not in any appreciable degree affect the question whether there was such a debt or no.

36. An admission, then, being relevant only against the person who makes it or his representative, what is its effect as against him? It is not, merely as an admission, conclusive; the person who made it may show that he was mistaken, or was not telling the truth; he may diminish the importance to be attached to it in any way he can: he is not precluded from contradicting it. Many admissions, however, become "estoppels," and then, as will be seen hereafter,

Admission is relevant against the person who made it, but not on his behalf
Sec. 21.

What is the effect of an admission?
Sec. 31.

(Sec. 115), the person who made them cannot deny them. So far, however, as they are merely admissions, he may induce the Court to disbelieve or disregard them if he can.

Certain admissions are relevant on behalf of the person who made them.

Sec. 21.

37. We now come to the exceptions to the rule that admissions are relevant only against the person who made them and his representatives, and not in his or their favor. There are certain cases in which a person's admissions may be proved in his own behalf. In the first place there are certain statements, which on account, either of the nature of the circumstances in which they are made or the subjects to which they refer, are expressly declared by the law to be relevant as proof of the facts to which they refer, if the person who made them is dead, or cannot be found, or for other good reason cannot be produced. Such, for instance, is a statement made in the ordinary course of business, or the discharge of professional duty; a statement made contrary to the interest of the person making it, or a statement as to relationship by a person having special means of information. The statements, which are thus made relevant, are set forth in Section 32, and will be considered immediately, para. 42. Now, supposing any statement of this class to have been made by a party to the suit or other person whose statements are regarded by the Act as admissions, the admission will be relevant not only against the person making it but in his favor. For instance, a Captain is tried for casting his ship away. He produces his log-book, with entries by himself, showing that the ship was kept in her due course. It would appear at first sight that he could not make use of the entries, in his own behalf, as being admissions; but they are admissible, under the present exception, as being entries made in the regular course of business, which are admissible under Section 32 whenever the person who made them cannot be produced.

When an admission as to relevant state of mind or body may be

38. Again, a man may prove his own admissions on his own behalf, when the admission relates to a relevant state of body or mind, was made at or about the time when such state of body or mind existed, and was accompanied by

conduct rendering its falsehood improbable. A tradesman, for instance, wants to prove, that, at a particular date, he believed a certain Banker, A, to be solvent; he may for this purpose prove that about the time in question he said, "A is the safest Banker in the town," at the same time placing a large sum in A's hands.

39. Again, an admission may be proved by the person who made it, or on his behalf when, under some other head of relevancy, it can be shown to be relevant otherwise than as an admission. A man, for instance, is accused of receiving stolen goods, knowing them to be stolen. He may prove his own refusal to sell them below their real value, because that refusal would be relevant under Section 8, as explaining conduct influenced by a fact in issue. Had he known them to be stolen, he would have been anxious to sell, though at a sacrifice; his conduct, therefore, in not wishing to sell is relevant, and so are his statements explaining that conduct. In like manner a man might prove his own statements, if they formed part of the same transaction with a relevant fact under Section 6, or were the occasion of a relevant fact under Section 7, or are necessary to explain it under Section 9. In any of these cases, accordingly, the admission is admissible, not only against the person making it but in his favour.

At this point we find an important departure from the English law as to the effect of oral admissions of the contents of a document. In England such admissions may be used as proof: but under the present Act they are not relevant unless the party proposing to prove them shows that he is entitled, under rules to be considered hereafter, to give secondary evidence of the document, or unless the genuineness of a document produced is in question. This exclusion does not extend to an admission which a party chooses to make at the trial, which dispenses with the necessity of proof. Section 58.

Oral admissions of contents of document.
Sec. 22.

Another restriction on the use of admissions as evidence Privileged

communications.
Sec. 23.

is that an admission cannot, in civil cases, be proved, if it has been made on the express condition that it should not be used, or in circumstances from which such a condition can be inferred. This is to guard against the improper use of communications made, as it is said, "without prejudice," and would in a civil suit preclude the use of admissions made to priests and other confidential advisers.

Confessions of
accused persons.
Secs. 24—29.

*40. Under the heading of admissions provision is made for the confessions of accused persons. No such confession is relevant if it appears to have been obtained by means of any inducement, threat or promise, having reference to the charge, proceeding from a person in authority, and sufficient to make the accused person suppose that he would, by making it, better himself, in a temporal way, with reference to the proceedings. The provisions of the Code of Criminal Procedure as to the inadmissibility of confessions to the Police, and of a confession made by a person in Police custody except in the presence of a Magistrate, are merely developments of the principles here enacted.

Confessions, other than those expressly excluded, are not irrelevant merely because made under a promise of secrecy or in consequence of a deception, or during drunkenness.

Confession of
co-accused.
Sec. 30.

41. Lastly, Judges are relieved from the attempt to perform an intellectual impossibility by a provision, that, when more persons than one are tried for an offence, and one of them makes a confession affecting himself and any other of the accused, the confession may be taken into consideration against such other person as well as against the person making it. Such a confession is, of course, in the highest degree suspicious; it deserves ordinarily very little reliance: but nevertheless it is impossible for a Judge to ignore it, and, under the Indian Evidence Act, he need no longer pretend to do so. The exclusion, in fact, was one of those rules of evidence, borrowed from the English system, which, though well adapted to trials by Jury are meaningless and out of place on occasions where the functions of Judge and Jury are combined in a single official. The Indian

Judge has simply to consider whether the confession ought to have any weight with him, and, if any weight, how much, in the opinion he forms about the case. The exclusion of confessions of this kind from the definition of "evidence" is intended, apparently, to remind the Judge that he is dealing with very unsound materials, and that, though he may take them into consideration, he must not rely on them as the sole or even as the chief basis of his belief.

42. Next follow the statements, to which reference has already been made in para. 37, which, from their nature, are declared to be relevant facts, when the person who made them is dead, or for other good reason cannot be produced, or cannot be produced without a degree of expense and trouble which the Court considers unreasonable. These are

Statement
made by a wit-
ness who can-
not be pro-
duced.
Sec. 32.

1. Statements by a person, since deceased, as to the cause of his death :
2. Statements made in the ordinary course of business :
3. Statements against a person's interest :
4. Statements as to the existence of any public right or custom or matter of public interest, made by a person likely to know of the existence of such right, custom or matter, and before any controversy about it had arisen :
5. Statements as to relationship made by a person having special means of knowledge, before the question in dispute was raised :
6. Statements as to relationship of deceased persons, contained in Wills, Deeds, Pedigrees, on tombstones, family portraits, or other records of a like nature, and made before the question in dispute was raised :
7. Statements in Deeds, Wills or other documents relating to any transaction, in which some

right or custom in dispute was created, claimed, modified, recognized, asserted or denied, or which was inconsistent with the existence of such right or custom :

8. Statements by a number of persons of their feelings or impressions, when such feelings or impressions are relevant to the matter in question.

Statements in
former judicial
proceeding.
Sec. 33.

43. In the next place a statement made by a witness in a former judicial proceeding is a relevant fact when the witness is dead or cannot, without unreasonable trouble, be produced, and if

- (1) the proceeding was between the same parties or those whom they represent.
- (2) the adverse party had the right and opportunity to cross-examine, and
- (3) the questions in both proceedings were substantially the same.

Statements
made under
special circum-
stances.
Sec. 34.

44. We have seen that certain statements are relevant if the person making them cannot be produced, Section 32, or is a party to the suit, Section 17 : we next come to a class of statements, which are relevant on account of their special character and the circumstances in which they are made, whether the person who made them can be produced or not, and whether or not he is a party to the suit. Such are entries in books of account, regularly kept in the course of business, subject however, to the condition that they shall not be sufficient evidence to charge any one with liability without some independent evidence of the fact stated in them. So also are entries in public records or registers by a public servant or other person in discharge of his duty ; statements in published maps, or in maps made under the authority of Government ; statements of facts of a public nature made in the recital of an Act of Parliament, or of any of the Indian Legislatures, or in a Notification in the Gazette of any Indian Government, the London Gazette or the Government Gazette of any English Colony ; statements

of the law of any country contained in a book published under the authority of the Government of that country, and published rulings of the Courts.

45. The next class of relevant facts are judgments of the Courts of law. These are often relevant facts of the highest importance. Foremost amongst these are the judgments in civil cases which have the effect of rendering the matter in question *res judicata* as between the parties and so barring the question from being re-opened. By Section 13 of the Code of Civil Procedure, Act XIV of 1882, no Court may try any suit or issue in which the matter, directly and substantially in issue, has been directly and substantially in issue in a former suit between the same parties or those under whom they claim, litigating in the same title, in a Court of competent jurisdiction, and has been heard and finally determined by such Court. Wherever, accordingly, any matter in issue has been raised and adjudicated in a former suit between the parties or those whose representatives they are, the judgment in the former suit becomes relevant for the purpose of showing that this is so. Sections 42 and 43, of the Code, again, provide that every suit shall include the whole of the Plaintiff's claim, and that if a Plaintiff omits to sue in respect of any portion of his claim, he shall not afterwards sue in respect of the portion so omitted; and that if, being entitled to more than one remedy in respect of the same cause of action, a Plaintiff omits, without leave of the Court, to sue for any of such remedies, he cannot afterwards sue for the remedy so omitted. Former judgments may therefore be material for showing that the claim advanced forms part of a former claim, or that the remedy for which the Plaintiff sues is one for which the Plaintiff might have sued in a former suit in respect of the same cause of action.

Judgments
when relevant
facts.
Secs 40—41.
Res Judicata.

46. The same principle applies to criminal law. An accused person may, under Section 403 of the Code of Criminal Procedure, bar proceedings against himself by showing that he has been previously acquitted or convicted.

Former con-
viction or ac-
quittal.

by a competent Court on the same facts as those in respect of which he is being prosecuted. The judgment of the Court by which he was acquitted or convicted, would, in such case, be relevant.

Certain judgments are conclusive against all the world.

47. We have seen that civil judgments do not ordinarily preclude any one but the parties to the suit or their representatives from contesting the matter upon which they are pronounced. There are, however, certain very important exceptions to this rule. There are some judgments, the nature of which is not to define a man's rights against the particular individuals, who are parties to the proceeding, but to declare his status generally as against all the world. As to what these judgments are, and as to the grounds on which they operate not only as against the parties to the suit but as against all the world, the rulings of the English Courts and the various text-books have, unfortunately, not been wholly free from indistinctness. While all parties agreed that judgments of this nature were to be called 'judgments in rem,' the origin and real signification of that expression has been very partially understood, and it is difficult to reconcile the theories which have been enunciated by different English tribunals on the subject. When, however, the historical sources of the 'judgment in rem' came to be examined, it became apparent that its peculiar efficacy was originally derived, not from the nature of the judgment itself, as declaring status, but from the character of the proceeding in which, and of the tribunal by which it was pronounced; and it is with reference to these considerations that the law, which now regulates the subject in India, has been framed.

Doctrine of the 'judgment in rem.'

Provisions of the Act, as to judgments which are conclusive against all the world.
Sec. 41.

48. Section 41 of the Act, accordingly, defines the tribunals and the proceedings in which a judgment will have this universal application. It provides that a final judgment of a Court exercising Probate, Matrimonial, Admiralty or Insolvency Jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled

to any specific thing, not against any specified person but absolutely, is conclusive proof that any legal character, which it confers, accrued at the time when the decree came into operation; that any legal character, to which it declares any person to be entitled, accrued at the time mentioned in the decree; that anything, to which it declares a person to be entitled, was that person's property at the time at which the decree declares it to be his.

49. With the exception of the cases just noted, there are no judgments conclusive in Indian Courts against persons other than the parties to the proceedings or their representatives as to the facts which they declare or the rights which they confer. There are, however, some judgments which, though not conclusive proof of what they state, and not binding upon anybody but the parties to the proceeding and their representatives, may yet be considered by the Court by way of evidence as to the facts with which they are concerned. Such are judgments relating to matters of a public nature; as, for instance, in a suit, in which the existence of a public right of way is disputed, a judgment between other parties, in which the existence of the same right of way is affirmed or negatived, may be put in as evidence of the existence or non-existence of the right; though the party against whom it is employed will be at liberty to counteract it, if he can, as he would any other piece of hostile evidence.

Judgments which, though not conclusive against all the world, are relevant as evidence of the facts stated in them.
Sec. 42

50. Lastly, the existence of a judgment will sometimes be a relevant fact under some of the other provisions of the Act as to relevancy. For instance, the fact that A has obtained a decree of ejectment against B may be the motive for B's murdering A; or it may be necessary, for the purpose of proving A's position, to show that he suffered judgment to go by default against him at a particular time; or the fact of A's having prosecuted B for slander may explain the relations of the parties and their state of mind on a subsequent occasion, or the judgment may itself be a fact in issue, as where A sues B because through B's fault

Judgments relevant under some other provision of the Act.
Sec. 43.

A has been sued and cast in damages. In any such case the judgment will be a relevant fact.

Opinions when
relevant facts
Sec. 45-50

51. The next class of relevant facts are "opinions." There are some cases in which, with a view to ascertaining the truth about a thing, it becomes important to know what people think about it. This is obviously a somewhat unsubstantial sort of proof, and it will be seen that it is only in very special cases and under very strict conditions that 'opinions' are admissible.

Opinions as to
matters of for-
eign law, sci-
ence, art or
handwriting.
Sec. 45.

52. In the first place it is often necessary for the Court in the course of an enquiry to be informed on some matter, which is material to the decision, and which involves knowledge of a special, technical or scientific character, and this information can be supplied only by some one who is specially versed in the subject. What is the law of a foreign country as to some particular point; what are the symptoms of a particular sort of poison; what are the causes of certain symptoms; what would be the results of a certain blow in a certain part of the body; do particular symptoms commonly show unsoundness of mind, and is the unsoundness of mind so shown of such a nature as to render a person incapable of knowing the character of his acts; could a ship, seaworthy at one time, be in a specified condition of unseaworthiness at another; does a picture appear genuine or fictitious; is a singer's voice of a particular quality; is one specimen of handwriting written by the same hand as another: these and a hundred kindred questions are of daily recurrence in the courts, and can be answered only by the 'opinions' of those who possess special information about each of the matters involved respectively.

Experts.
Sec. 45

53. Such specially skilled persons are called experts, and their opinions on any point of foreign law, science, art, or identity of handwriting are relevant, whenever the Court has to come to a decision with reference to any of these matters. Moreover, when an expert's opinion is relevant, any fact, which supports or is inconsistent with that opinion, becomes relevant.

54. In the next place there are some opinions, which, ^{Opinions of persons possessing special means of information.} though not given by experts, are yet relevant as being the ^{less important} opinions of persons possessing special means of information. ^{Sec. 47} As to the question whether some particular document was written or signed by some particular person, the opinion of any person who is acquainted with the handwriting of that ^{Handwriting} person, is relevant and a person is said to be acquainted with the handwriting of another, when he has (1), seen him write; or (2), received letters purporting to be signed by him in reply to letters addressed to him; or (3), been in the habit, in the ordinary course of business, of seeing documents purporting to be signed by him.

55. Again, when the question is as to the existence of ^{General custom or right.} any general custom or right, the opinions of persons, who ^{Secs. 48, 49} would be likely to know of its existence, are relevant. And so, when the question is as to the usages and tenets of any body of men or family, the constitution and government of any religious or charitable foundation, the meaning of words or terms as used in particular places or by particular classes, the opinions of persons having special means of knowledge thereon, are relevant. On matters of relationship, moreover, the opinion, expressed in conduct, as to such relationship, by persons having special means of knowledge on the subject, whether relatives or not, is relevant, except in certain specified cases for the purpose of proving such relationship. Thus, as a general rule, the fact of two ^{Relationship} people being man and wife, or of one person being the ^{Sec. 50} legitimate child of another may be inferred with tolerable safety from the behaviour towards them of other members of the family. There are, however, certain important cases, such as proceedings in divorce and prosecutions for bigamy, in which the fact of marriage must be substantiated in a more formal manner.

56. We now come to the last class of relevant facts, the ^{Character when a relevant fact.} cases, namely, in which character is relevant. In civil cases ^{Secs. 52-55} a person's character cannot be proved for the purpose of showing that any conduct attributed to him is probable

INTRODUCTION.

or improbable. If a man is sued for breaking his promise or for wrongful detainer of another man's goods, or for selling an article inferior to sample, evidence cannot be given to show that it was likely, from his disposition and reputation, that he should do that which is alleged against him. It is obvious that enquires into the ordinary transactions of life would be indefinitely prolonged, if, in deciding whether a man had or had not done something, the Court was at liberty to enquire whether he was the sort of man to do it. We do not know enough about each other's motives and dispositions, and we cannot analyze them with sufficient delicacy or minuteness, to allow us safely to draw inferences from them as to the way in which people will behave on any particular occasion. In civil enquiries, accordingly, all evidence of this nature is rejected, though a Judge must, of course, draw his own inferences from the relevant facts proved as to the character of the parties concerned, and such inferences may materially affect the probability of any conduct imputed to them. In criminal enquiries the case is different. There is a broad line between crime and innocence, and when the question is whether a man has committed an offence or not, his character becomes a material consideration. Sometimes it is almost conclusive: suppose, for instance, that a murder is committed under such circumstances that one of two persons must be the murderer: one of them is a habitual offender, of notorious evil life, of ferocious disposition, of lawless habits: the other is a person of refinement, delicacy and saintliness. Who can doubt that in such a case the character of the person concerned is a main element in the consideration of innocence or guilt? It is necessary, however, to lay down rules as to how much evidence of character shall be let in. In the first place it must be always right that an accused person should have the benefit of a previous good character. and of any favorable inferences that are to be drawn from it. Evidence of good character is accordingly always admissible.

As to previous bad character, the anxiety of the Legislature that persons on their trial should be treated with all possible fairness and even indulgence has excluded evidence of previous bad character except in two cases. If a man has been previously convicted of an offence, that is a tangible, unmistakable piece of evidence about him, and the Court is to weigh this in determining on the probabilities as to his innocence or guilt. The Act, accordingly, provides that when a man is tried for any offence, a previous conviction is declared by the present Act to be a relevant fact, and may be proved as a substantive part of the case for the prosecution, not merely introduced, at a stage subsequent to conviction for the purpose of entailing a heavier punishment. The effect, however, of the section has been neutralized and the original position of the law on this point restored by Section 310 of the Code of Criminal Procedure, 1882, which provides that, when an accused person is charged with an offence committed after a previous conviction, that part of the charge which states the previous conviction shall not be read out in Court, nor shall evidence in support of it be given, until and unless the accused has pleaded guilty to, or been convicted of, the subsequent offence. Another case, in which character is relevant, is that in which an accused person chooses to bring forward evidence of his previous good character: he has then challenged enquiry on the point, and it is obviously right that evidence to contradict the evidence of his alleged good character, should be admissible. In any such case, therefore, the fact of the accused being of bad character would become relevant.

57. Lastly, character is relevant in civil cases, wherever it affects the amount of damages to be recovered, as in actions for libel, seduction, or in proceedings in the Divorce Court. It is obvious that in enquiries of this nature, the amount of injury inflicted, and, consequently, the compensation to be given, must depend to a large extent, on the character of the person concerned; and the Court must,

Previous conviction,
Sec. 51.

Character relevant when it affects damages.
Sec. 55.

accordingly, take notice of this in assessing the damages to which such person is entitled.

Certain facts admitted for the purpose of corroborating or discrediting witnesses.

58. This completes the list of relevant facts. There are certain other facts, provided for in Sections 146, 148, 155, 156 and 157, which may, in certain circumstances, be proved for the purpose of discrediting a witness either by showing previous inconsistent statements, or in some other manner proving him to be untrustworthy; or for corroborating a witness by showing corroborative circumstances or by proof of previous statements consistent with his present evidence. It will be, however, more convenient to consider them in the natural order, when we come to the mode in which witnesses are to be examined.

Second branch of the subject. How are relevant facts to be proved.

59. This concludes the first part of the Act, as to the material of belief. We now proceed to consider the second of the two main divisions of the subject, *viz*, the mode in which this material is to be brought to the Judge's mind,—in other words, how facts, which are relevant under the preceding sections, are to be proved. This is provided for in Parts II and III of the Act.

Some facts which need not be proved.

Judicial notice.
Sec. 17.

60. In the first place there are certain facts which need not be proved at all. These are, generally, facts of so public and notorious a character that everybody is supposed to know them; such as the law in force in British India, Acts of Parliament, the course of proceeding of Parliament and of the Indian Legislatures, the accession and Sign-manual of the Sovereign, various official seals, the appointment of various officers, and other facts of a like nature. As to these no proof need be offered. The Court takes judicial notice of them, and in doing so, may resort for aid to appropriate books of reference. A party, however, calling upon the Court to take judicial notice of any fact, must be ready to supply it with any necessary book for the purpose of reference.

Facts which the parties agree to admit,

61. In the next place no proof need be given of facts which the parties or their agents agree to admit at the

hearing, or which, before the hearing, they agree to admit by writing under their hands, or which, by any rule of pleading in force at the time, they are deemed to have admitted by their pleadings.

62. This last provision is of less importance in India, than it would be in England, where pleading has been reduced to a rigid, and, until recent times, highly technical system. According to English Law, wherever a material averment, properly put forward by one party, is passed over by the adverse party without denial, it is taken to be admitted: and, accordingly, if the plaintiff states a fact, and the defendant's plea does not contradict it, but goes upon some other ground of defence, (as for instance, that the suit is barred by the Statute of Limitations,) this is held to amount to an admission of the fact by the defendant. No such rule, it need hardly be said, is, in any but a very small degree, applicable to proceedings in an Indian Court, where the Judge, in most instances, frames the issues, as he picks the merits of the story out from the statements of the conflicting parties, and where those parties are generally unlettered peasants without professional assistance. In important suits, where the pleadings are more exact and elaborate, written statements are put in, the facts, which either party is prepared to substantiate, admit or deny, are ascertained with great precision: and in these the pleadings do practically narrow the controversy to certain definite issues. And even in simpler suits cases occur in which a Judge would consider that a man had virtually made an admission by his pleading; as, for instance, if a tenant, being sued by his landlord for a breach of the conditions of his lease, pleaded leave and license in the particular instance, the landlord might be considered to be relieved from the necessity of proving the tenancy. So, a defendant who, when sued for a bond-debt, pleaded payment, might be taken to have admitted the existence of the bond. No fixed rules, however, on the subject, have as yet found a place in the procedure of the Indian Courts. It, is how-

ever, a recognized rule that a party who has deliberately set up, as his case, one set of facts, cannot be allowed, at a later stage, to repudiate it and set up another.

Rules as to
the mode of
proof.
Sec. 59.

63. Coming to facts which have to be proved, we have, first, the two cardinal rules that (1), all facts, except the contents of documents, may be proved by oral evidence ; and that (2), oral evidence must in every instance be direct, that is to say, if the fact to be proved is one that could be seen, the evidence must be that of a witness who saw it ; if the fact is one that could be heard, the evidence must be that of a witness who heard it ; if it be one which is perceptible by any other sense, the evidence must be that of a witness who perceived it by that sense ; if the fact to be established is the existence of an opinion in a person's mind, the evidence must, as a general rule, be that of the person who says that he holds that opinion.

Specimens of
direct evi-
dence.

64. Let us suppose, for instance, that A is charged with the murder of B, and that the facts alleged in support of the charge and shown to be relevant under Part I, are as follows :

1st Witness.—A came running from the scene of the murder at 12 o'clock.

2nd Do. Some one screamed out at the same time and place, " A, you are murdering me."

3rd Do. A left his house at 11½, vowing that he would be revenged on B for pressing so hard for his debt.

4th Do. There was blood at the scene of the murder, and on A's hands and clothes.

5th Do. There were tracks of footsteps from the scene of the murder to A's house, which corresponded with A's shoes.

6th Do. The wound which B received, was in my opinion, of a character to cause death, and could not have been inflicted by himself.

7th witness.—The deceased said “The sword-blow inflicted by A has killed me.”

8th Do. The prisoner said to me, “I killed B, because I was desperate.”

9th Do. The prisoner told me that he was deeply indebted to B. The prisoner was a man of excellent character.

65. Now these various circumstances, statements and opinions, would all be relevant facts under Part I, and the rule now under consideration provides that, in each instance, they must be proved by direct evidence; that is, the fact that A came running from the scene of the murder, as alleged, must be proved by a witness who tells the Court that he himself saw A so running; the fact of the screams heard by 2nd witness must be proved by the 2nd witness telling the Court that he did hear such screams; the fact of A having vowed, shortly before the murder, to be revenged on B must be proved by the 3rd witness, who heard the vow: so, the blood by the person who saw it; the footsteps, by the person who tracked and compared them; the doctor's opinion as to the wound, by the doctor testifying that that is his opinion; the dying man's statement, and the prisoner's confession by a person who heard them. They must not be proved by the evidence of persons to whom any of the witnesses above mentioned may have told what they heard, or saw, or thought.

66. For instance, all the following evidence would be indirect: Specimen of indirect evidence.

10th witness.—My child came in and said, “I have seen A running in such a direction.”

11th Do. The Police told me that screams had been heard at such a time.

12th Do. Father said, “I am sure there will be murder, for A has just left the house, vowing to be revenged on B.”

13th witness.—The Police said that they had compared the footsteps and found that they exactly fitted.

14th Do. The Doctor said that the man could never cut himself like that.

15th Do. Everybody said that there was no more doubt, for the deceased man had identified the prisoner.

16th Do. B's wife told me the day before that A was heavily indebted to him.

All the evidence of witnesses 10 to 16 would be inadmissible, not because the facts to which it refers are irrelevant but because it is not "direct," that is, not given by the persons who with their own senses perceived the facts described, or in their own minds formed the opinions expressed. The only use that could be made of it would be for the purpose of corroborating some other witness by proving a former consistent statement made by him at the time: or of discrediting him by proving a former inconsistent statement. Except for these purposes it would be inadmissible.

Opinions of experts may be proved by treatises,
Sec. 59.

67. An exception to the rule that the existence of an opinion must be proved by the person who holds that opinion, is made in favour of experts, whose opinions may be proved by their published treatises, if the expert is dead or cannot be found, or if the Court considers that to call him as a witness would involve unreasonable delay or expense. Special provisions also are made in the Code of Criminal Procedure for obviating the necessity of the personal attendance of Civil Surgeons and Chemical Examiners to Government; but these provisions in no way infringe the principle in question. The evidence of these officers must be direct, as in every other case: but, on grounds of public convenience, they are allowed to give it in a different way from other people.

Production of By way of securing that the Court shall, in every instance

have before it the best possible means of forming an opinion, it is provided that when the evidence refers to the existence or condition of any material object, the Court may require it to be produced for inspection. Such inspection is frequently indispensable in order to the proper understanding of the oral evidence, and enables the Court to draw important inferences as to the truthfulness of the witnesses.

Material
object
Sec. 60

68. So much for the mode of proving everything except documents : Chapter V deals with the proof of the contents of documents, and this brings us to the distinction between primary and secondary evidence.

Proof of docu-
ments
Sec. 61.

Primary evidence of the contents of a document is the document itself produced for the inspection of the Court. Where a document is executed in several parts, each part is primary evidence ; and, where a document is executed in counterpart, each part is primary evidence as against the party executing it. Where a number of documents are made by a uniform process, such as printing or photography, each one is primary evidence of the contents of all the rest.

Primary evi-
dence
Sec. 62.

69. Secondary evidence includes

- (1) Certified copies given under the provisions of the Act ;
- (2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies ;
- (3) Copies made from or compared with the original ;
- (4) Counterparts of documents, as against the parties who did not execute them ;
- (5) An oral account of the contents of a document given by some person who has himself seen it.

Secondary
evidence.
Sec. 63.

70. The rule on this subject is that documents must be proved by primary evidence, except

Documents
must be prov-
ed by pri-
mary evidence.
Exceptions.
Sec. 65.

- (a) when a document is in the power of the person against whom it is to be proved, or of a person

legally bound to produce it, or of a person out of reach of, or not liable to the process of the Court, and such person does not (after notice to produce in cases in which such notice is necessary) produce it ;

in this case any secondary evidence of its contents is admissible.

(b) when the existence or contents of the original are proved to have been admitted in writing by the person against whom it is to be proved or his representative ;

here the written admission is admissible.

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason, not arising from his own neglect or default, produce it in reasonable time ;

here any secondary evidence of the contents of the document is admissible.

(d) when the original is of such a nature as not to be easily moveable ;

here again any secondary evidence may be given.

(e) when the original is a public document, *viz.* :

I, a document forming the act or record of the act of

Public documents.
Sec. 74

1. The Sovereign authority,
2. Official bodies and tribunals,
3. Public officers, Legislative, Judicial and Executive, whether in British India, or other portions of Her Majesty's dominions, or a foreign country,

or II, a public record kept in British India of private documents ;

in this case the contents of the original may be proved by a certified copy.

Sec. 65.

(f) when the document is one which may by this Act

or any other law in force in British India, be proved by a certified copy ;

here a certified copy is admissible.

- (g) when the original consists of numerous accounts or other documents which cannot conveniently be produced, and the fact to be proved is the general result of the whole collection ;

here the result may be proved by any person, skilled in the examination of such documents, who has examined them.

71. The notice to produce referred to in (a) is by no means invariably necessary. When the document, the contents of which are to be proved, is itself a notice ; when from the nature of the case, the adverse party must know that he will be required to produce it ; when the adverse party has obtained possession of the original by fraud or force, or has the original in Court, or has admitted its loss, and when the person in possession of the document is out of reach of or not subject to the process of the Court, no notice to produce is necessary ; and the Court may, if it thinks fit in any other case, allow secondary evidence of a document to be given, without the previous notice to produce it.

Notice to produce not always necessary.
Sec. 66.

72. Next follow provisions (Sections 67—73) as to the proof of handwriting and signatures where a document is alleged to have been written or signed by a particular person, and as to proof of attestation when a document is required by law to be attested. As to the latter, the admission of a party to such a document of its execution by himself is sufficient proof as against him ; in other cases one attesting witness must be called to prove execution, or if there be no attesting witness alive or subject to the process of the Court or capable of giving evidence, or if the document purports to have been executed in the United Kingdom, it will suffice to prove that the attestation of one attesting witness is in his handwriting, and that the signature of the person executing the document is in his handwriting. If the attesting witness denies or does not

When handwriting and attestation must be proved.
Secs. 67—73.

recollect execution, it may be proved by other evidence.

- In order to prove that a signature, handwriting or seal is that of a particular person it may be compared with any signature, handwriting or seal, proved to the satisfaction of the Court to have been written or made by that person ;
- and the Court may direct any person in Court to write any words or figures for the purpose of comparison. The opinions of experts and of persons acquainted with the handwriting are, under Part I, relevant for the purpose of identifying it : in order to prove handwriting, therefore, some such person should be called.

How certified
copies to be
procured.
Sec. 76.

73. We have seen that public documents may be proved by a certified copy. Provision is made in Section 76 for securing these certified copies by the enactment that every public officer having custody of a public document, which

- a person has a right to inspect, shall give that person, on demand and on payment of the legal fees, a copy signed, stated and certified to be correct.

Special ways
of proving cer-
tain public
documents
Sec. 78.

74. Beside these certified copies, there are special ways of proving certain public documents which are pointed out in Section 78. Acts, orders or notifications of the Government of India or any Local Government in any Executive Department may be proved by the records of the department, certified by its head, or by any document purporting to be printed by order of Government : the proceedings of the Legislatures by their journals, published Acts, or abstracts, or copies purporting to be printed by order of Government : proclamations, orders or regulations issued by Her Majesty, the privy Council or any department of Government, by copies or extracts contained in the *London Gazette* or purporting to be printed by the Queen's Printer : the Acts of the Executive, or proceedings of the Legislature of a foreign country, by journals published by their authority or commonly received in that country as such, or by a copy certified under the seal of the country or Sovereign, or by a recognition thereof in an Act of the Governor-General in Council : proceedings of a Municipal body in

British India, by a copy of such proceedings certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body: public documents of any other class in a foreign country, by the original or by a copy certified by the legal keeper thereof, with a certificate, under the seal of a Notary Public or British Consul or Diplomatic Agent, to the effect that the copy is duly certified by its legal keeper.

75. One important branch of the proof of documents consists of certain presumptions, which the law authorizes in respect of them. It becomes necessary, accordingly, at this point, to say something of presumptions generally, though it is only with such presumptions as affect documents that we have at present to deal. The word 'presumption' has been used in the English 'text-books with a very wide signification; on the one hand 'presumptions of fact' or 'natural presumptions' are described as including all those natural inferences which our acquaintance with the physical conditions of the world, the order of things and the constitution of human nature causes us to draw from any given fact: on the other hand 'presumptions of law' or 'artificial' presumptions are defined as meaning certain inferences, which the law directs to be drawn from certain facts, irrespective of the natural inference which those facts suggest: and these, again, are divided into two classes, "rebuttable," when evidence may be given for the purpose of contradicting the inference, and "irrebuttable" or "conclusive" when no such evidence can be given.

Presumptions
as to docu-
ments.
Sec. 79-90.

Natural and
artificial pre-
sumptions.

Rebuttable
and conclusive
presumptions.

76. These technical expressions have not been preserved in the present Act, but the subject has been provided for in the following manner. There are, as the law now stands, three classes of inferences which the law directs or empowers a Judge to draw from certain facts in supersession of any other mode of proof. In the first place, the law sometimes directs an inference to be drawn which is indisputable. In this case, on proof of one fact, the Court is directed to regard some other fact as proved, and not to

Provisions of
the Act as to
presumptions.

When one thing is "conclusive proof" of another.

Sec. 8.

Meaning of "shall presume."

Meaning of "may presume."

Presumptions as to documents.

Sect. 79—90.

Presumption as to certificate, certified copy, &c.

Sec. 79.

admit proof for the purpose of contradicting it; here the fact, from which the inference is directed to be drawn, is said to be 'conclusive proof' of the fact inferred. For instance, the fact, that a person was born during the continuance of a valid marriage between his mother and any man, is, unless non-access be proved, conclusive proof of his legitimacy; and judgments of certain Courts are, as we have seen, conclusive proof of the facts which they state.

77. In the next place the inference may be one that the Court is bound to accept as proved until it is disproved; in this case it is said that the Court "*shall* presume;" or, thirdly, the inference may be one, as to which the Court is at liberty either to accept it as proved until it is disproved, or to call for proof of it in the first instance; in this case it is said that the Court "*may* presume." All that the law does for this last class of inferences is to allow the Court to dispense with evidence should it think fit to do so.

78. The two latter classes of inferences, which are styled "presumptions," play, as will be seen, a very important part in the proof of documents. Sections 79—85 and Section 89 provide for cases in which the Court *shall* presume certain facts about documents; Sections 86, 87, 88 and 90 provide for cases in which the Court *may* presume certain things about them. In the one case, therefore, the Court is bound to consider the presumption as proved until the contrary is shown; in the other, the Court may, if it pleases, regard the presumption as proved until the contrary is shown, or may call for independent proof in the first instance.

79. Thus, in the case of every document purporting to be a certificate, certified copy or other document which is declared by law to be admissible as proof of any fact, and which purports to be certified by any officer in British India or by any authorized officer in any Native State in alliance with Her Majesty, and which is substantially in correct form, the Court shall presume that the document is genuine, and that the officer who signed or

certified it held at the time the official character which he claims in it.

As to a document, purporting to be a record of judicial evidence or confession or statement of an accused person, made in accordance with law, purporting to be signed by a Judge or other authorised officer,

Presumption as to record of judicial evidence
Sec. 80

the Court shall presume

- (1) that the document is genuine ;
- (2) that the statements by the Judge or other officer as to the circumstances under which such evidence, statement or confession was taken, are true ; and
- (3) that such evidence, statement or confession was duly taken.

As to a document purporting to be the *London Gazette*, the *Gazette of India* or of any of the Local Governments, or of any dependency of the British Crown ; or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer ; or to be a document directed by law to be kept by any person, if it is in due form and comes from proper custody,

Presumption as to public documents.
Sec. 81

the Court shall presume that it is genuine.

As to a document purporting to be a document, which would by law be admissible in an English or Irish Court, without proof of its seal or stamp or signature or of the official character of the person signing it,

Document admissible in English or Irish Court.
Sec. 82.

the Court shall presume that the seal, stamp or signature is genuine, and that the person signing it held the official position which he claims in it ; and the document shall be admissible for the same purpose as that for which it would be admissible in England or Ireland.

As to maps or plans purporting to be made by the authority of Government,

Maps and plans.
Sec. 3.

the Court shall presume that they were so made, and are accurate.

Authorized
Law books.
Sec. 64.

As to books purporting to be printed or published under the authority of the Government of any country and to contain the laws of that country, and as to books purporting to contain reports of decisions of the Courts, the Court shall presume that they are genuine.

Powers of At-
torney.
Sec. 95.

As to documents purporting to be Powers of Attorney, executed before and authenticated by a Notary Public, or any Court, Judge, Magistrate, British Consul or Vice-Consul or representative of Her Majesty or of the Government of India,

the Court shall presume that they were so executed and authenticated.

Certified copy
of judicial
record of for-
eign country.
Sec. 86.

As to any document purporting to be a certified copy of any judicial record of a country not forming part of Her Majesty's dominions, and certified by a representative of Her Majesty or of the Government of India in the manner customary in such country,

the Court may presume that it is genuine and accurate.

Books of pub-
lic interest.
Sec. 87.

As to any book to which the Court may refer on a matter of public or general interest, and any published chart or map, produced for its inspection,

the Court may presume that it was written and published by the person, and at the time and place by whom or at which it purports to have been written and published.

Telegraphic
messages.
Sec. 88.

As to a message forwarded from a Telegraph office, the Court may presume that it corresponds with the message delivered for transmission at the office from which it purports to be sent.

Document
called for and
not produced.
Sec. 89.

As to a document called for and not produced after notice to produce,

the Court shall presume that it was duly attested, stamped and executed.

Documents
thirty years
old produced
on proper
custody.
Sec. 90.

We come, lastly, to a presumption which is of great importance in obviating the effects of the lapse of time as to the proof of documents. As years go on the witnesses who can personally speak to the attestation or execution of a document, or to the handwriting of those who executed or

attested it, gradually die out. If strict proof of execution or handwriting were necessary, it would, after a generation, become impossible to prove any document. On the other hand there is some reason to suppose that documents, of which people take care for a long series of years, are authentic. The law acts upon this probability, and provides the presumption that, in the case of a document, proved or purporting to be thirty years old, and produced from proper custody, that is the place in which, and the care of the person with whom it would naturally be,

the Court may presume that the signature and every other part of such a document is in the handwriting of the person, by whom it purports to be written, and that it was duly executed and attested by the persons by whom it purports to be executed and attested.

80. This concludes the provisions of the law for the proof of documents. Before we quit the subject of documents, however, there is a subject of the utmost difficulty and importance to be disposed of, *viz.*, the cases in which the existence of a document operates to exclude any other evidence as to the matter to which the document refers.

Exclusion of oral by documentary evidence.

81. As to this there are two cardinal rules, *viz.*:

First, that (a) when the terms of a contract, grant or other disposition of property have been reduced to the form of a document, or (b) whenever any matter is required by law to be in the form of a document, no evidence shall be given of the terms of such contract, grant or disposition of property, or of such matter except the document itself or secondary evidence of its contents in cases in which secondary evidence would be admissible.

Exclusion of oral evidence by documentary in certain cases, Secs 91, 92.

The second rule is merely an amplification of the first: it is that in any such case no evidence of any contemporaneous oral agreement or statement shall be admitted, as between the parties to the document or their representatives, for the purpose of contradicting, varying, adding to, or subtracting from, its terms.

Exceptions.

82. Both these rules, however, are subject to important exceptions. As to the first it is provided that a public officer, whose appointment must by law be in writing, may, nevertheless, be proved to be such officer by the fact of his having acted as such, without the production of the writing by which he was appointed. In the next place Wills admitted to Probate in British India may be proved by the Probate. It is explained, too, that the statement in a document of a fact other than the terms of a contract, grant or disposition of property, or which is not required by law to be in writing, does not preclude proof of such fact by any other means. For instance, the fact of a receipt for money paid having been given does not prevent the payment being proved in any other way.

Cases in which oral evidence is admissible notwithstanding the existence of a document

83. The provisos to the second of the above rules go far to modify their effect; and their operation forms one of the most subtle and difficult branches of the Law of Evidence: They are the following:—

(1) In the first place any fact which would invalidate a document, or which would entitle any person to a decree or order in respect of it, may be proved. Thus, a man may show that a written agreement was for an illegal purpose, was obtained by fraud, or was without consideration, or was executed by him during minority, or under a mistake of law or fact: (2), a separate oral agreement as to a matter on which the document is silent and which is not inconsistent with its terms, may be proved; and so may (3), a separate oral agreement constituting a condition precedent to the attaching of any obligation under the document; (4), a subsequent oral agreement to modify or reverse the original contract, except when it is obliged by law to be in writing, or has been duly registered; (5), an usage or custom annexing incidents to the contract, not expressly mentioned in it, but not inconsistent with its express terms; or (6), any fact which shows in what manner the language of the document is related to existing facts.

As to these provisos it is to be observed that (3) appears

to be a complete departure from the principle of the rule : it would be difficult to imagine a more serious variation of the terms of a contract than a condition that the whole or part of it shall be inoperative until certain other things have happened : yet this may under 3) be done by oral agreement. Proviso (4) is no exception to the principle of the rule, because the subsequent oral agreement constitutes in fact a new contract, and so far as it varies the former contract, rescinds it. Unless therefore there is something to invalidate the second contract, there is nothing to prevent it from taking effect. Proviso (5) too, is no exception to the rule; but is intended, probably, to guard against the improper exclusion of oral evidence tendered merely for the purpose of showing the real meaning of a document.

In the application of this rule, it should be observed that it applies only as between the parties to a document or their representatives. Other persons than these may give evidence of a contemporaneous oral agreement varying the terms of the document.

84. This introduces the difficult question of the extent to which extraneous evidence may be given to aid in the interpretation of documents. This is dealt with in Sections 93—100. The rules may be stated generally as follows :—

Employment
of oral evi-
dence in the
interpretation
of documents,
Secs. 93—100.

(1) When language is, on the face of it, ambiguous or defective, its defects cannot be remedied by evidence. Where, for instance, there are blanks in a deed, or where the idea conveyed by its language is an ambiguous one, such as when the oracle answered Pyrrhus in terms which meant equally well either that he could conquer the Romans, or that the Romans could conquer him. In such cases extraneous evidence cannot be given to show what the meaning was.

(2) When language is plain in itself and applies accurately to existing facts, evidence cannot be given to show that it was intended to apply to other facts.

(3) When language is plain in itself but unmeaning in

reference to existing facts, evidence may be given to show its meaning.

(4) Where language would apply equally well to several persons or things, but could not have been intended to apply to more than one of them, evidence may be given to show to which of such persons or things it was intended to apply.

• (5) Where language applies partly to one set of facts and partly to another, but the whole of it does not apply accurately to either, evidence may be given to show to which it was intended to apply.

(6) Where a document contains illegible or unintelligible characters, foreign, obsolete, technical or provincial terms, or abbreviations or words used in a peculiar sense, evidence may be given to explain them.

• The above rules of interpretation do not apply to documents which are governed by the Indian Succession Act: Chapter XI of that enactment makes express provision for the interpretation of Wills, and the two subjects are, accordingly, kept apart.

Production
and effect of
evidence.

85. We have now seen in Part I of what the material of belief must consist; in Part II, the mode in which that material must be brought to the Judge's mind, *viz.*, by oral or documentary evidence, according to the circumstances of the case.

Burthen of
proof.

This, however, by no means exhausts all the topics which have to be considered with reference to the subject of proof. There is, in the first place, the all-important question as to which of the parties before the Court is bound to supply the evidence which is to be the material of the Judge's belief on the question in dispute, in other words, on which of the parties the burthen of proof lies. There are, as we have seen in Sections 56—58, certain facts which need not be proved by either party: but all other facts can be found by the Court only on legal proof, and the question as to whose duty it is to supply this is frequently of the most momentous consequence to the parties.

The first and obvious principle is that the burthen of proving the existence or non-existence of any fact lies on the party who wants the Court to believe such existence or non-existence. If A sues B on a bond, and B denies its execution, the burthen of proving the execution of the bond lies on A, and till he has proved that, he has not made out a *prima facie* case. Supposing, however, that B admits the execution of the bond, but pleads that it was obtained by fraud or executed during minority, the burthen of proving these assertions is now on him, as, since his admission of the execution of the bond, the *prima facie* case is in favor of the plaintiff; unless, therefore, the defendant makes out his plea of fraud or minority, the decision must be against him. It will thus be apparent that the burthen of proof may be shifted during the proceedings according to the facts proved by the witnesses or admitted by the parties. The burthen of proof will, in the first instance, as a general rule, be on the plaintiff as being the party who wants to put the law in motion: but facts may be proved or admitted, which will have the effect of shifting the burthen to the defendant and will entitle the plaintiff to judgment in his favor unless they are disproved.

The burthen
of proof.
See 101.

How the bur-
then of proof
is shifted.

86. This shifting of the burthen of proof is in a large number of instances the result of presumptions. It is obvious that, when a presumption is raised, the burthen of disproving the fact presumed is thrown upon the party who denies it. For instance, a man is charged with having received stolen property knowing it to be stolen; the burthen of proof lies in the first instance on his accusers: but if he is shown to be in possession of the stolen property shortly after the theft and to be unable to account for his possession of it, a Judge may presume his guilty knowledge, and, if he does so, the result will be to shift to the accused person the burthen of disproving guilty knowledge, and, in default of his succeeding in disproving it, to render him liable to be convicted of the offence. Or, again, a man is sued on a bill of exchange; if the acceptance is proved or admitted, the

Effect of pre-
sumptions in
shifting the
burthen of
proof.

Judge * must presume that there was good consideration for it ; thereupon the burthen of proving that there was no consideration will lie upon the defendant, and in default of his making this out, judgment will go against him. Wherever, accordingly, it is provided in the Act that the Court may presume a thing, the Judge has the power of throwing the burthen of proof on whichever party he pleases. Wherever it is provided that the Court shall presume a thing, the burthen of disproving it is thrown, irrespectively of the Judge's opinion, on the party who denies it. Wherever, again, it is provided that the burthen of proving a thing is to be on any particular person, this is tantamount to a provision that the Court shall presume against the existence of that thing until the person in question has proved its existence.

Rules as to the
party on whom
the burthen of
proof is to lie.

87 In the following instances special provision is made as to the party on whom the burthen of proof shall lie ;

- I. When it is necessary, in order to render particular evidence admissible, that some fact should be proved, the burthen of proving that fact lies on the person who wants to use the evidence ; *e.g.*, if A wants to prove a dying declaration of B, he must prove that B is dead : if he wants to use secondary evidence of a document, he must prove that the original is destroyed or lost, (Sec. 104.)
- II. When a person is accused of an offence, the burthen of proving that his case falls within any general or special exception or proviso of the Indian Penal Code or other law, lies on the accused, (Sec. 105.)
- III. When a fact is specially within the knowledge of any person, the burthen of proving it lies on him, (Sec. 106.)

* See Negotiable Instruments Act, 1881, Sec. 119.

- IV. If a man is shown to have been alive within thirty years, the burthen of proving him to be dead lies on the person affirming it, (Sec. 107.)
- V. If a man has not been heard of for seven years, the burthen of proving him to be alive lies on the person asserting it, (Sec. 108.)
- VI. When people are shown to have stood in the relation of partners, landlord and tenant, or principal and agent, the burthen of proving that such relationship has ceased lies on the person asserting it, (Sec. 109.)
- VII. When a person is in possession of anything, the burthen of proving him not to be the owner lies on the person asserting that he is not the owner, (Sec. 110.)
- VIII. When a person stands in a position of active confidence, such as trustee, towards another, the burthen of proving the good faith of any transaction between them lies on the person in the position of active confidence, (Sec. 111.)

88. In all the above cases, as the law directs on whom the burthen of proof is to lie, no option is given to the Judge as to whether he will presume the fact or no: he is bound in every instance to presume against the party on whom the burthen of proof is directed to lie. In many of these cases this obligatory presumption is really part of the substantive law of the country. Obligatory Presumptions.

Besides these obligatory presumptions, however, in which the direct enactment of the law supersedes any reasoning process in the Judge's mind, there is a large class of presumptions where room is still left for the Judge to exercise his powers of inference, and where the rule of law is merely accessory to the reasoning process by which the result in each case is arrived at. In these cases, accordingly, the Judge can throw the burthen of proof on whichever side he chooses by presuming the fact, or by calling for proof of

it in the first instance. These are the "natural presumptions" to which reference has been already made, as being not the technical creations of law, but the natural result of our experience of the world. They are in fact inferences which the mind would draw of its own accord; and all that the law does for them is to authorize their being so drawn in cases where the Judge thinks well to do so.

Facts which
may be pre-
sumed.

Sec. 114.

89. Cases of this nature are dealt with in Section 114, which provides that "the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the case;" in other words, wherever the ordinary course of human events and the general tendency of human character render it probable, under the circumstances of the case, that a thing is true, the Court is at liberty to presume its truth, to exempt the party asserting it from the necessity of proof in the first instance, and to throw upon the party who denies it the burthen of showing that it is not true. Whether in any particular case it is safe so to do, is a question which the Judge must decide for himself according to his judgment. This is made clear by the Illustrations. Thus, it is in the ordinary course of things that a bill of exchange should be accepted for good consideration. A Judge may, therefore, and naturally will, as a general rule, presume that it was so accepted, and will throw upon the person who denies that good consideration was given, the burthen of proving it. But a bill may be brought into Court under circumstances, which would render it dangerous to apply the general presumption; suppose, for instance, that A, the drawer of a bill, is a man of business, and B, the acceptor is a young and ignorant person, completely under A's influence. Here the ordinary presumption that bills of exchange are given for good consideration is countervailed by the presumption that in this case B was over-reached by A, and the Court might, so far as the Evidence Act is concerned, throw upon

At the burthen of proving that consideration did, as a fact, pass. The presumption, however, in favour of consideration has now, under Section 118 of the Negotiable Instruments Act, 1881, ceased to be obligatory.

90. Various other instances of the same rule are given in the Illustrations to Section 114. It is, for example, likely in the natural course of things that a man, who is found in possession of stolen goods shortly after the theft, and who cannot account for their possession, has either stolen them or received them with guilty knowledge. The Court may, therefore, presume this to be so if it thinks well. But cases may arise in which such a presumption would be most unfair. A marked rupee is traced to a shopkeeper's till: he can give no specific account as to how it got there, yet it need not even raise a suspicion against him. So, again, the Court may presume, as being in accordance with the common course of things, that an accomplice is unworthy of credit: but there are cases in which, from the character of the parties and of the offence charged, the most implicit reliance may be placed in what an accomplice says. So, again, the Court may presume that evidence which might be and is not produced, would be unfavourable to the party not producing it: but it might well be that special circumstances, as, for instance, family considerations, would prevent a party from calling a witness whose evidence would be in the highest degree favourable to his cause: and it would be, therefore, unfair to make the usual presumption. Such presumptions ought not, therefore, to be obligatory. In all these, and similar cases, the Judge *may* presume; it is for him to decide whether or not he ought to do so.

91. We have in Sections 112 and 113 two obligatory presumptions of the character mentioned in para. 88. The fact of a person being born during a valid marriage between his mother and any man, or within 280 days after its dissolution, the mother remaining unmarried, is conclusive proof of his legitimacy, unless non-access be proved, (Section 112); and a Notification in the *Gazette of India* of

Conclusive
proof as to
legitimacy.

Conclusive
proof of ces-
sion of Terri-
tory.

a cession of British Territory to a Native Ruler, is conclusive proof of such cession and of its validity, (Section 113) Other instances of conclusive proof are afforded by those Judgments of Probate, Matrimonial, Admiralty or Insolvency Courts, which, as we have seen, are conclusive proof of any legal character or of any absolute right conferred or declared by them to exist. In all such cases further proof is, of course, superfluous, and all contradictory evidence inadmissible.

English law
of Estoppel
Secs 115—117.

92 We have next to consider a class of cases in which persons may, by their previous conduct, have disqualified themselves from making particular assertions in giving evidence. The law has a right to require a certain degree of consistency in those who seek its aid, and therefore to specify the conditions under which a suitor shall not be allowed to put forward a claim or a ground of defence or to make an assertion, which is contradictory to something which he has on some former occasion said or done. This principle is known as Estoppel. Under the English law a man may be estopped by the language of an instrument to which he is a party, or of a record of legal proceedings, in which he was concerned, or by his own conduct in some transaction, from setting up, as against any person who was a party to that instrument or those proceedings, or who was affected by that conduct, a contrary state of things. Questions of great nicety and difficulty have arisen in the Courts as to the extent to which these estoppels operate, and as to the statements and persons that fall within their scope. The tendency of modern opinion has been, however, unfavourable to the utility of estoppels, and the present law retains them only in cases which fall under the last of the three classes just mentioned, those, namely, in which a man is estopped by his own previous language or behaviour. The following are the only estoppels, which are known to the Indian law :

Estoppel by
declaration or
conduct.
Sec 115.

- I. When a person has, by his declaration, act, or omission, intentionally caused or permitted another person to believe a thing to be true, and

to act on such belief, neither he nor his representative can, in a proceeding between himself and such person or his representative, deny the truth of that thing.

- II. A tenant of immoveable property cannot, during the continuance of the tenancy, deny that the landlord had, at the commencement of the tenancy, a good title to the property leased; nor can a person, who came upon immoveable property by the license of the person in possession thereof, deny that the person so in possession had a title at the time when such license was given.

- III. An acceptor of a bill of exchange cannot deny that the drawer had authority to draw or endorse it; nor can a bailee or licensee deny that his bailor or licensor had, when the bailment or license commenced, authority to make it. This rule is, however, subject to the important exceptions that the acceptor of a bill may deny that the bill is drawn by the person by whom it purports to have been drawn; and that a bailee may, if he has delivered the bailed goods to a person other than the bailor, and is sued by the bailor in respect of such delivery, plead that such other person has a right to them as against the bailor.

93. These are the only cases in which a man is precluded by law from setting up what facts he pleases. Unless a case can be brought within these sections, the mere fact that a statement is contained in a deed, to which some person is a party, will not disable him from endeavouring to prove the contrary, though it may, of course, be evidence of an admission on his part, and so render it difficult for him to do

* See Negotiable Instruments Act, 1881, Secs. 120, 121. The acceptor of a bill of exchange for the honor of the drawer cannot, in a suit by a holder in due course, deny the validity of the instrument as originally drawn.

so. In like manner, the mere fact that a statement is contained in a judgment, to which some person is a party, will not estop him from setting up the contrary. The judgment may bar an action by showing that the same cause of action has been already disposed of; or that some matter directly and substantially in issue between the parties has been finally determined by a competent Court within the meaning of Section 13 of the Code of Civil Procedure: or it may be conclusive proof of some fact under Section 41 of the present Act, in which case, of course, no contradictory evidence can be given; or again, it may show that a person has brought himself within the scope of some of these sections as to estoppel, and is so precluded from denying the truth of some fact: but unless this is the case, he will be at liberty to prove any fact, notwithstanding that a judgment, to which he was a party, contains a statement about it to a contrary effect.

Rules as to the
examination
of witnesses.
Ch. ix.

94. We now proceed to the consideration of various detailed rules governing the examination of witnesses. All persons, we have already seen, are competent to testify, unless the Court considers that by reason of tender years, extreme old age, disease or infirmity, they are incapable of understanding the questions put to them and of giving rational answers. The last remnant of the system of excluding witnesses, which still lingered in the law of the High Courts, is swept away by the provision that husbands and wives shall be in all civil and criminal cases competent witnesses against one another.

Judges and
Magistrates
not compell-
able to answer
certain ques-
tions.

Sec. 121.

95. There are various cases, however, in which witnesses are exonerated or disabled from answering as to particular matters. In the first place no Judge or Magistrate can, except on the special order of some Court to which he is subordinate, be compelled to answer any question as to his own conduct in Court as such Judge or Magistrate; though he may be examined as to other matters which occurred in Court while he was so acting. No person, again, can be compelled to disclose any communications

made to him or her during marriage by any person to whom he or she is or has been married; nor may such communications be disclosed, unless by consent of the other party, except in suits between married persons, or prosecutions in which one married person is accused of an offence against another.

Communications during marriage.
Sec 122.

96. No person, again, can give evidence derived from unpublished official records, except with the permission of the department concerned; nor can a public officer be compelled to disclose communications made to him in official confidence; nor a Magistrate or Police officer to speak to the sources of his information as to the commission of any offence.

Affairs of State and official communications.
Secs 123—125.

97. The next class of excluded evidence consists of professional communications made by or on behalf of a client to his barrister, pleader, attorney or vakeel. No such person may, without the client's express consent, disclose any such communication, when it is made in the course and for the purpose of his employment; nor may he state the contents or condition of any document, with which he became acquainted in the course and for the purpose of such employment, or disclose any advice given by him to his client. The protection, however, in this case does not extend to

Legal advisers not to disclose professional communications.
Sec. 126.

(1) communications made in furtherance of any criminal purpose, nor to

(2) any fact, observed by a barrister, attorney, pleader or vakeel in the course of his employment, showing that a crime or fraud has been committed since the commencement of his employment. A solicitor, therefore, who, during his employ, observed that his client had been tampering fraudulently with his own books, would not be exempted from disclosing the fact.

98. An important modification in the existing law has been effected by the provision in Section 128, that a party to a suit who gives evidence at his own instance is not to be deemed thereby to have consented to a disclosure by his legal adviser of professional communications; and that

Client does not waive his privilege by giving evidence.
Sec. 128.

if he call his legal adviser as a witness, he does not consent to his disclosing professional communications, unless he questions him on matters which, but for such question, he would not be at liberty to disclose. As the law previously stood, if a party to a suit gave evidence therein at his own instance, he waived his privilege and was liable to have his communications with his legal adviser disclosed. As it may often be essential for the purpose of a suit that a party to it should give evidence in it at his own instance, the hardship of entailing such a consequence upon the giving of such evidence was extreme; and the present enactment appears to provide for the subject in a fairer and more reasonable manner.

Client need
not disclose
confidential
communication
with his
legal adviser.
Sec. 129

99. On the same principle no one can be obliged to disclose confidential communications between himself and his professional adviser, unless he offers himself as a witness: in that case he can be compelled to disclose any such communications as the Court thinks necessary to explain his evidence, but no others.

Witness need
not produce
title-deeds.
Secs. 130, 131.

100. Nor again, can any witness, who is not a party to the suit, be compelled to produce his title-deeds or any document which might tend to criminate him, unless he has agreed in writing to produce them: nor can he be compelled to produce deeds in his possession, belonging to another person, which that person, if they were in his possession, might refuse to produce; unless, of course, the person concerned consents to their being so produced.

Witness must
answer crimi-
nating ques-
tions.
Sec. 132.

101. On the other hand a witness cannot refuse to answer a question as to a fact, relevant or in issue, simply on the ground that the answer will tend to criminate him, or expose him to penalty or forfeiture. No such answer, however, can expose the witness to arrest or prosecution, nor can it be made use of in any criminal proceeding against him, except in case of a prosecution for giving false evidence.

102. The question of the sufficiency of the uncorroborated evidence of an accomplice to support a conviction was

the topic of frequent and prolonged controversy. A distinct rule on the subject is laid down by the provision in Section 133, that a conviction is not illegal merely because it is grounded on the uncorroborated evidence of an accomplice. The Courts have, however, in numerous instances held that such convictions ought not to be upheld. Another dubious point is cleared up by the enactment in Section 134 that no particular number of witnesses are required for proof of any fact. Any such rule is practically useless and may occasionally result in a miscarriage of justice.

Evidence of
accomplice.
Secs 133, 134

103. We come next to the mode in which witnesses shall be examined. The Judge is to allow only such evidence to be given as is, in his opinion, relevant. When the relevancy of a fact depends on proof of some other fact, the Judge may either insist on that other fact being proved first, or may accept the party's undertaking that it shall be proved at a subsequent stage. Thus, if it is proposed to prove a statement which would be relevant only if the person who made it is dead, the Court may insist on having that person's death proved before admitting the statement, or may admit the statement first on an undertaking that the death shall be subsequently proved.

Mode in which
witnesses are
to be examin-
ed.
Secs 135, 136

104. The examination of the witness by the party who calls him is termed his "examination-in-chief;" this is followed by his "cross-examination" by the adverse party, and this again by his "re-examination" by the party who called him. Both examination and cross-examination must relate to relevant facts, but the cross-examination may relate to relevant facts other than those with which the examination-in-chief was concerned. A person under cross-examination may also be asked questions to test his veracity, to discover his position in life or to shake his credit. The re-examination must, except with the permission of the Court, be directed to the explanation of matters referred to in cross-examination; and if the Court allows new matter to be introduced in re-examination, the opposite party has a right to cross-examine on the matter so introduced. A

Examination,
cross-examin-
ation, and re-
examination
to what topics
confined
Secs. 137—140.

person does not, however, become a witness by the mere fact of producing a document in obedience to a summons. and, unless he is called as a witness, he cannot be cross-examined. Witnesses to character may be cross-examined and re-examined in the same manner as any other witness.

When leading questions may be asked
Secs. 141, 142, 143.

105. The important distinction between the examination and cross-examination is that in examination and re-examination leading questions, that is, questions which suggest the answer which the questioner wishes or expects to receive, must not be asked, except with the permission of the Court: while in cross-examination leading questions may be asked. The Court, however, is to permit leading questions in examination or re-examination as to matters which are introductory or undisputed, or which have, in the opinion of the Court, been already sufficiently proved.

Witness about to give oral evidence of a document in existence may be stopped.
Sec. 144.

106. We next have a rule for the purpose of carrying out the provisions of Section 91, as to the exclusion of oral by documentary evidence; this is, that any witness, who is about to give evidence as to a contract, grant or other disposition of property, may be asked whether it was not in writing, and if he says that it was, he may be stopped, and the production of the document enforced, or the right to give secondary evidence made out. This rule is extended to any document which, in the opinion of the Court, ought to be produced. Care must, however, be taken not to apply it to cases in which oral evidence is given of statements of other people about the contents of documents, when those statements are relevant. Supposing, for instance, that the question was whether A had murdered B. A witness might prove that A had said "B's bond is iniquitous, I will kill him sooner than pay it," without the bond being produced; the reason obviously being that what the witness wants to prove is not the contents of the document, but *A's feeling about the contents of the document*, as applying a motive for his crime.

Previous statements.
Sec. 145.

107. A witness, also, may be asked about previous statements made by him and reduced into writing without such

writing being proved: before, however, the writing can be proved for the purpose of contradicting the witness, his attention must be drawn to such parts of it as are to be used for the purpose of contradicting him

108. This brings us to the class of questions which are asked, not for the purpose of proving or disproving relevant matter, but for the purpose of testing, impugning or confirming the veracity of a witness. Such questions, in India especially, are of material importance in guiding the Judge's mind in his view of the case. For this purpose it is provided that a witness may be asked any question which tends

Questions as
to character.
Secs. 146—150.

- (1) to test his veracity;
- (2) to discover who he is, and what his position in life;
- (3) to shake his credit by injuring his character.

It is no objection to the asking of such questions that the answer to them might tend to criminate the witness, or expose him to penalty or forfeiture. It is necessary, however, to make careful provision against so powerful an engine being oppressively or wantonly employed. It would be a grievous hardship if every person, who came forward to give evidence, was liable, at the caprice of an unscrupulous cross-examiner, to have every detail of his life dragged into the light, and to be forced to reply to interrogations, which suggest what the interrogator dares not assert, and thus are merely slanders in disguise. To the Judge, accordingly, is confided the delicate and responsible task of admitting or excluding questions asked with the view of testing or injuring the witness' character. When a question is asked merely for this purpose the Court is to decide whether the witness is to be compelled or not to answer it. In deciding whether such a question is proper or not, the Court is to consider, firstly, whether the imputation conveyed by it is such as seriously to affect the Court's opinion as to the witness' veracity, or whether, from remoteness of time or from its character, it would affect it only in a very slight degree; and, secondly, whether there is a great disproportion between the importance of the imputation conveyed and

the importance of the evidence given. If the evidence is very unimportant, and the imputation on the witness' character very serious, the question ought not to be asked. A witness, for instance, who proves the posting of a letter or the entry of some unimportant item, ought not to be asked questions, the answers to which might blast his reputation. With a view to such considerations as these, it is further provided that the Court *may* infer from the witness' refusal to answer that the answer, if given, would be unfavorable to him, but that it is not bound to do so.

In no case ought such a question to be asked, unless the person asking it has some reasonable grounds for supposing the imputation, which it conveys, to be true. Barristers, attorneys and other professional persons offending against this rule are liable to be reported to the High Court or other authority to which they are subordinate.

Indecent and
scandalous
questions.
Secs. 151, 152.

109. The Court has also the power of forbidding questions which it regards as indecent or scandalous, unless they relate to facts in issue or are indispensable to the proof or disproof of facts in issue. Questions also that appear to be intended to insult or annoy, or which are couched in a needlessly offensive form, may be forbidden.

All. wits. to
que. for facts to
character
cannot be
contradicted.
Sec. 153.

110. It is obvious that questions, asked merely to discredit a witness, introduce matter altogether foreign to the enquiry, and that, if controversy about the matter so introduced were allowed, the Court would be occupied with deciding, not the merits of the case but the merits of the witnesses; and that thus any suit might be indefinitely protracted. It is, therefore, provided that, whenever a witness has answered a question asked merely for the purpose of discrediting him, no evidence shall be given in the case to contradict his answer: the only remedy, if he answers falsely, is to prosecute him afterwards for giving false evidence. To this rule, however there are two exceptions, allowed perhaps, because they are matters which admit of clear and easy proof. If a witness is asked whether he has been previously convicted and denies it, the previous conviction

may be proved: and if he is asked about and denies any fact tending to impeach his impartiality, as "are you not the plaintiff's brother?" or "have you not received a bribe from the defendant?" the fact impeaching his impartiality may be proved

111. Besides being asked questions tending to discredit, a witness may be discredited by the evidence of other persons to the effect that (1), they, from their knowledge of the witness, believe him to be unworthy of credit; (2), that the witness has been bribed or has accepted the offer of a bribe; (3), that he has on former occasions made statements inconsistent with his present evidence; and (4), in prosecutions for rape or attempts to rape in which the prosecutrix is a witness, that she was of generally immoral character. Any of the above facts may be proved by the party cross-examining a witness, and, with the consent of the Court, by the party who calls him.

Evidence to
discredit a
witness.
Sec. 155.

112. Here, again, precautions are taken to prevent the Court going into irrelevant controversy by the following rule. Where a witness states that he believes another to be unworthy of credit, he may not, in his examination-in-chief, be asked his reasons for so believing: but in cross-examination he may be asked for his reasons, and his answers to such questions cannot be contradicted; though, of course, they may render him subsequently liable to a prosecution for giving false evidence. It is clear that, but for some such rule, there might be a pitched battle fought over the character of every witness, and that suits would be simply interminable.

Restrictions to
which such
evidence is
subject.
Sec. 155.

113. Next, follow provisions for corroborating a witness by asking him about circumstances, other than those to which he speaks, which he observed about the same time or place. Another mode of corroboration is by proving a former statement to the same effect as the witness' present evidence, made by the witness (1), either at or about the time when the fact, to which he speaks, took place; or (2), before any competent legal authority.

Corroboration.
Secs. 156, 157.

Relevant
statements
may be cor-
roborated or
contradicted,
Sec. 158.

114. There are, as we have seen, some cases in which, under the provisions of this Act, a person's statement becomes relevant. Wherever this is the case, it is obviously right that the statement should, as far as possible, be submitted to every test to which oral testimony is submitted. It is provided, accordingly, in Section 158 that in every case in which, under section thirty-two or thirty-three of the Act, a statement is made relevant, the statement may be corroborated or contradicted, or the credit of the person, who made it, may be impeached or confirmed by any evidence which would have been admissible against that person, had he been called, in cross-examination. Take for instance, the case of an entry in a deceased trader's books: any former entry or statement, corroborative or contradictory, or any fact, tending to show that the person making it was untrustworthy or partial, which might have been proved if he had been cross-examined, may be proved for the purpose of increasing or diminishing the importance to be attached to the entry.

Refreshing
memory,
Secs. 159, 160.

115. Sometimes a witness needs to refresh his memory as to the facts about which he speaks. This he may do by referring to any writing made by himself at the time of the transaction to which it refers, or so soon after that his memory was still fresh; or even to a document, made by another person but read by the witness and known by him to be correct while his memory was still fresh. A witness may also, for the purpose of refreshing his memory, refer to a copy of any document, to which he might refer, if it were produced, provided that good cause for the non-production of the original be shown. He may also testify to facts stated in any document, to which he might refer to refresh his memory, though he has no specific recollection of them, if he is sure that they were correctly recorded. Any paper used to refresh the memory must be produced and shown to the opposite party, who may, if he pleases, cross-examine upon it.

* See *ante* paras. 42 and 43.

116. It sometimes occurs that a witness is summoned to produce a document, which he has a right to refuse to produce, or which would, if produced, be inadmissible as evidence. In this case he must, notwithstanding any objection that there may be to its production or admissibility, bring it to Court, and the Court will decide as to whether he is bound to produce it, and as to whether it is admissible. In order to decide on its admissibility, the Court may, unless it be a document of State, inspect it, or take evidence about it.

Witness summoned to produce document must bring it to Court.

Sec. 162.

117. We have seen¹ that previous notice to produce a document is in some cases necessary in order to make secondary evidence of its contents admissible in case of its non-production. This notice to produce may affect the position of the party giving it. If he gives notice to produce, and at the trial calls for the document and inspects it, he is bound to put it in as evidence if the other party requires it. The law will not allow him to compel its production, and see its contents, and then make use of it or not, according as it strengthens or impairs his cause.

Document called for and inspected must be given in evidence if required.

Sec. 163.

Another provision, grounded on the same principle of fair play, is that a person refusing to produce a document, which he had notice to produce, cannot afterwards, except with consent of the opposite party or by order of the Court, himself use it as evidence.

Person refusing to produce a document cannot afterwards put it in as evidence.

Sec. 164.

118. We come next to the Judge's power to ask questions. It frequently happens that the parties do not, in their questions, elicit all the facts necessary to a sound view of the merits of the case. A plaintiff may have some weak point in his case which he is afraid of betraying and so dexterously avoids, or a defendant may fail to perceive the import of some answer given and allow it to pass uncriticized: in any such case it is highly important that the Judge should be armed with full power enabling him to get at the facts. He may, accordingly, subject to conditions to be immediately noticed, ask any question he pleases, in any

Judge's power to ask questions.

* See *ante*, paras. 70 and 71.

Restrictions
on Judge's
power to ask
questions

form, at any stage of the proceedings, about any matter relevant or irrelevant, and he may order the production of any document or thing. No objection can be taken to any such question or order, nor are the parties entitled, without the Court's permission, to cross-examine on the answers given. This general power, however, is very closely restricted. In the first place, the question must be based on relevant facts, and those relevant facts must have been duly proved: next, the Judge cannot compel a witness to answer any question, or to produce any document which he would be entitled to refuse to answer or produce at the instance of the opposite party; nor may the Judge ask any of the questions as to credit which would be improper if asked by the adverse party; nor can he dispense with primary evidence of a document unless the facts of the case show that secondary evidence is admissible.

A Judge, accordingly, cannot, by the exercise of the powers conferred by this section, import into the decision of the case any fact which is not relevant under the Act, nor can he in any case dispense with the prescribed mode of proof, or ask questions to credit, except such as would be permitted if asked by the parties. Thus restricted, the power of asking questions is of obvious utility in a country like India, where, in the vast majority of cases, no advocate is employed, but the Judge has to make out the truth as best he can from the confused, inaccurate and often intentionally false accounts of ignorant, excited and mendacious witnesses.

Improper ad-
mission or
exclusion of
evidence.

119. The Act concludes with repeating the provision of Act II of 1855 to the effect that the improper admission or rejection of evidence is not ground for a reversal of the judgment or for a new trial of the case, if the Court considers that, independently of the evidence improperly admitted, there was evidence enough to justify the decision, or that, if the rejected evidence had been admitted, it ought not to have varied the decision. When, therefore, an appeal is grounded on the improper exclusion or admission of

evidence, the appellant must be prepared to show, not only that there has been an improper admission or exclusion, but that a miscarriage of justice has been thereby occasioned.

120 Such is, in outline, the general plan of the Indian Evidence Act. A thorough grasp of this is indispensable to any proper understanding of the various detailed provisions of the Act and of their connection with and relationship to one another. If it be remembered that the first part of the Act deals with the materials out of which the Judge's opinion is to be formed, and the rest of the Act with the modes in which that material is to be imported into his mind, the sequence of the various chapters becomes natural and intelligible. Those various modes of importing the material of belief fall generally under the definition of "proof," and proof is dealt with under the two main heads, according as it is written or oral, in the provisions to oral evidence and witnesses, and the provisions as to documents. When the material has been, in a legal manner, placed before the Judge's mind, the function of a law of evidence is complete, and the process,—too subtle and difficult to be regulated by any law—of inference or reasoning begins. The Judge is not, however, at this point left entirely without assistance from the law. There are certain inferences which the law either commands him in every case to draw from particular facts or states of fact, or places its sanction upon his drawing, in any particular instance, in which he thinks fit. The Judge starts with the general assumption of the non-existence of the facts which the party before him wishes him to believe: in other words the burthen of proving a fact is, as a general rule, on the party asserting it. But the circumstances of the parties, or something which they have said or done may easily shift this burthen to their antagonist, and hence arises the law of presumptions. These vary in cogency from being arbitrary and invariable rules, enacted for special reasons by the legislature, to being nothing more than the inferences, which every one, who reasons at all, necessarily draws for

himself. Section 114 really does no more than place a legal sanction on the mental process, by which, in all cases except the few of which the direct action of the senses either our own or other people's, inform us,—the condition of belief is produced. We may believe, for instance, that a man is in the receipt of stolen goods, either because we saw him receive them from the thief, or because we are told by some one who saw him to do so ; but there is another, less direct, but far more usual, way for the belief to be produced. No one has seen the receipt of the stolen goods: none the less there are facts from which it may be properly inferred, and one of them is formulated in the provision in Section 114, that the Court may presume that a man, who is found in possession of stolen goods, soon after the theft, and who cannot account for their possession, is either the thief or has received them, knowing them to be stolen: or, to state the proposition generally, the Court may infer the existence of a fact, in the absence of direct evidence of its existence, if "it thinks it likely to have happened, regard being had to the common course of natural events, human conduct and private business, in their relation to the particular case." But this is only a formal description of the process of inference, which is momentarily going on in every reasonable being's mind.

121. With this branch of the subject the law of Evidence does not, further than as above described, attempt to deal. It is impossible to lay down legal directions for the conduct of a man's understanding. But it is not to be supposed from this that the art of reasoning justly,—the mental process by which facts are marshalled and weighed, proper importance is given to each, and the right result ultimately arrived at,—is one for which no rules exist or which can be acquired at haphazard. The great majority of mankind, indeed, believe this to be the case and consequently never do acquire the art.


Even among educated persons it is probable that few have ever systematically considered the laws of thought,

INTRODUCTION.

by which their own minds ought to be governed and their own beliefs arrived at. In great domains of human thought, passion, prejudice, superstition or self-interest have obliterated the very idea that reasoning, to whatever subject applied, is only the correct use of the available material of belief, and that our power of reasoning may be indefinitely increased by rigorous discipline and systematic employment of sound methods, or may be weakened and degraded by carelessness, neglect or self-indulgent surrender to other disturbing influences. Almost all men, for instance, feel it a duty to approach the consideration of such subjects as theology or politics with various strong predilections of country or race: and the disturbing currents of sentiment—often very barbarous and irrational—which agitate the calm atmosphere, in which the reasoning process should be performed, have been, and are regarded with satisfaction and honored with applause. In many portions of the world the very attempt to reason fairly on such subjects is still denounced as a crime. On the whole, it would not, probably, be too much to say that, though of all processes the most essential to man's well-being, and the highest of which he is capable, none is less systematically studied, or less seriously considered than that by which we—each one for himself—draw the conclusions which constitute our opinion on the highest and lowest subjects alike. Those who study a law of Evidence will do well to remember that it deals only with one, and the least, difficult, branch of the formation of belief, that of defining its material and the mode in which that material is to be provided. The use to be made of that material in the Judge's mind, when it gets there, will depend on mental and moral faculties and habits, which belong to a higher region than that with which the law can deal. Unless, these faculties and habits are sound and good, rules of evidence, however ingenious and elaborate, will be but of small avail. "*Sincerum est nisi vas, quodcunque infundis acescit;*" and unless the mental tribunal,

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before which the materials of belief are brought, is itself an efficient machine for dealing with them,—in other words unless the Judge be a man of well-disciplined reasoning powers, of clear insight, of calmness in thought, and habitual patience and impartiality,—well armed against the intellectual snares, which beset the course of induction, and, above all, animated by a deep sense of the responsibilities of his position and a conscientious desire to discharge them with ‘Justice, equity and good faith,’—unless these conditions be present, no rules of evidence that human ingenuity can contrive, will secure the great ends in view, the ascertainment of the truth and the decision of the right.



THE.
INDIAN EVIDENCE ACT.

NO. 1 OF 1872.

(RECEIVED THE ASSENT OF HIS EXCELLENCY THE GOVERNOR-GENERAL
ON THE 15TH MARCH 1872)

*Amended by Act XVIII of 1872, 29th August 1872, and
Act No. XVII of 1886.*

WHEREAS it is expedient to consolidate, define and Preamble.
amend the Law of Evidence ; It is hereby enacted
as follows :—

PART I.
RELEVANCY OF FACTS.

CHAPTER I.
PRELIMINARY.

1. This Act may be called “ The Indian Evi- Short title.
dence Act, 1872.”⁽¹⁾

It extends to the whole of British India,⁽²⁾ and Extent.
applies to all judicial proceedings in or before any
Court,⁽³⁾ including Courts Martial,⁽⁴⁾ but not to affi-
davits presented to any Court or officer, nor to
proceedings before an arbitrator ;

and it shall come into force on the first day of Commence-
September 1872. ment of Act.

Note.

-(1) The law of Evidence is *lex fori*.—Evidence is one of those
matters which are governed by the law of the country in which the
proceeding takes place, and not by that of the country where the
contract sued upon was made, or, in any other way, the cause of

action arose. This principle of law was thus laid down by Lord Brougham; "The law of Evidence is the *lex fori* which governs the Courts. Whether a witness is competent or not: whether a certain matter requires to be proved by writing or not: whether certain evidence proves a certain fact or not: that is to be determined by the law of the country where the question arises, where the remedy is sought to be enforced, and where the Court sits to enforce it."—*Baird v. Whitehead and Furness Junction Railway Company*, 3 H. L. C., 1.

(2) The Evidence Act is not included in the list of Acts declared by Act XV of 1874 to be in force throughout the whole of British India "except the scheduled Districts," and is therefore in force in every part of British India alike.

(3) "Court" is defined by Section 3.

(4) "Courts Martial."—This provision is overridden so far as regards European Courts Martial, by Section 127 of the Army Discipline and Regulation Act, 1881, 44 & 45 Vict. c. 58, which provides that "a Court Martial under this Act shall not as respects the conduct of its proceedings, or the reception or rejection of evidence, or as respects any other matter or thing whatsoever, be subject to the provisions of the Indian Evidence Act, 1872, or to any Act, law or ordinance of any Legislature whatsoever other than the Parliament of the United Kingdom."

Section 128 provides that "the rules of evidence to be adopted in proceedings before Courts Martial shall be the same as those which are followed in Civil Courts in England, and no person shall be required to answer any question or produce any document which he could not be required to answer or produce in similar proceedings before a Civil Court."

Repeal of
enactments.

2. On and from that day the following laws shall be repealed :—

(1) All rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India: ⁽¹⁾

(2) All such rules, laws and regulations as have acquired the force of law under the twenty-fifth section of 'The Indian Councils' Act, 1861,' in so far as they relate to any matter herein provided for; ⁽²⁾ and

(3) The enactments mentioned in the schedule hereto, to the extent specified in the third column of the said schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed.

Note.

(1) **Repeal of non-statutory rules.**—This has the effect of repealing the whole of the English Common Law on the subject of evidence so far as it was in force in British India. The decisions of the English Courts on points of evidence have, accordingly, no binding effect in Indian Courts, and can be referred to only for the purpose of explaining or illustrating the meaning of the present Act where this Act contains provisions similar to rules of evidence in force in England. This result is recognized by the Judicial Committee of the Privy Council in *Lekaraj Kuar v. Mahpal Singh*, L. R., 7 I.A., 70; 5 Cal., 754.

The Hindu and Mahummadan Laws abound in rules of evidence, as, e.g., to the number of witnesses requisite to prove particular matters, the exclusion of certain witnesses, and the presumption to be raised in certain cases. These rules do not appear to have been among those portions of the existing law of the country which the British Power retained in force on assuming the administration of Government. At any rate since the commencement of the present century the Courts have not considered themselves in any way bound by them. All doubt on the subject was removed by this section.

(2) **Repeal of rules, &c., under 'The Indian Councils' Act,' Section 25.**—Clause (2) refers to various rules as to evidence issued by the Government in "Non-Regulation" Provinces previous to the Indian Councils' Act, 1861, 24 & 25 Vict. c. 67, which became law by virtue of Section 25 of that enactment. In the Punjab, for instance, there was a special rule as to the production of a daybook and ledger for proof of book-debts. Other provisions of a like nature were in force in other non-Regulation Provinces.

3. In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :—

Interpretation
clause.

"Court" includes all Judges and Magistrates, "Court."

and all persons, except arbitrators, legally authorized to take evidence.⁽¹⁾

"Fact." "Fact" means and includes—

(1) any thing, state of things, or relation of things, capable of being perceived by the senses;⁽²⁾

(2) any mental condition of which any person is conscious.

Illustrations.

(a) That there are certain objects arranged in a certain order in a certain place, is a fact.

(b) That a man heard or saw something is a fact.

(c) That a man said certain words is a fact.

(d) That a man holds a certain opinion, has a certain intention, acts in good faith or fraudulently, or uses a particular word in a particular sense, or is or was at a specified time conscious of a particular sensation, is a fact.

(e) That a man has a certain reputation is a fact.

"Relevant" One fact is said to be relevant to another when the one is connected with the other in any of the ways referred to in the provisions of this Act relating to the relevancy of facts.⁽³⁾

"Fact, in issue." The expression "Facts in issue"⁽⁴⁾ means and includes—

any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature, or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows.

Explanation.—Whenever, under the provisions of the law for the time being in force relating to Civil Procedure, any Court records an issue of fact, the fact to be asserted or denied in the answer to such issue, is a fact in issue.

Illustrations.

A is accused of the murder of B.

At his trial the following facts may be in issue :—

That A caused B's death ;

That A intended to cause B's death ;

That A had received grave and sudden provocation from B ;

That A, at the time of doing the act which caused B's death, was by reason of unsoundness of mind, incapable of knowing its nature.

“ Document ” means any matter expressed or “ Document.” described upon any substance by means of letters, figures, or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

Illustrations.

A writing is a document

Words printed, lithographed, or photographed are documents.

A map or plan is a document.

An inscription on a metal plate or stone is a document.

A caricature is a document.

“ Evidence ” means and includes—⁽⁵⁾

“ Evidence.”

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry :

such statements are called oral evidence ;

(2) all documents produced for the inspection of the Court ;

such documents are called documentary evidence.

A fact is said to be proved when, after consideration of the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.⁽⁶⁾

"Disproved." A fact is said to be disproved when, after considering the matters before it, the Court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved." A fact is said not to be proved when it is neither proved nor disproved.

Note.

(1) "**Court.**"—The provisions of the Act, therefore, will apply to Commissions to take evidence under the Civil Procedure Code, or under the Code of Criminal Procedure, but not to examinations of witnesses by the Police, nor, for the reasons stated in note (4) to Section 1, to proceedings before European Courts Martial.

A Registering officer is a "Court" within the meaning of this section.—*Kristo Nath Koonloo and others v. T. F. Brown and others*, I. L. R., 14 Cal., 176.

A Sub-Registrar is a "Court" within the meaning of this section.—*In the matter of the Petition of Sardhari Lal*, 13 B. L. R., App, p. 40, dissented from but not on this point in *Kali Kanta Surma v. Gouri Prosad Surma Bardeuri*, I. L. R., 17 Cal., 906.

(2) "**Fact**"—is often understood as denoting some event which occurred or something which was done, as opposed to something said or some opinion or feeling of mind or body. This is not the sense in which it is used in the Act. Statements, feelings, opinions and states of mind or just as much "facts" as any other circumstance of which, through the medium of the senses or by our own self-consciousness, we become aware; and all, if they comply with the requirements of the Act as to relevancy, are equally admissible for the purpose of proving or disproving the matter to which they relate.

(3) "**Relevant.**"—The various ways in which one fact may be so related to another as to be relevant to it, are described in Chapter II. Sections 5—55.

(4) "**Facts in issue**"—are facts out of which some legal right, liability or disability, involved in the enquiry, necessarily arises, and upon which, accordingly, a decision must be arrived at. Supposing the enquiry to be whether A is entitled to succeed to B's property as his son, the fact of A being B's son, the facts of B's death and the existence of B's property, would then be facts in issue, because out of them A's right of succession necessarily arises. Supposing the

enquiry to be whether A is liable to punishment for having murdered B, the fact of B having been killed by A, the fact of A's motives and intentions at the time, the fact that he did it in self-defence, or, by accident, or intentionally, would all be facts in issue because out of them, taken conjointly with one another, would arise A's liability to punishment. Other facts bearing on, or connected with these facts in issue in any of the manners pointed out in Chapter II, though not, *per se*, giving rise to A's liability, would be relevant facts.

(5) "**Evidence.**"—As thus defined, "Evidence" does not include the whole material of the Judge's belief; for instance, a Magistrate or Session Judge may question the prisoner, and the prisoner's answers to the Magistrate may be used against him; but they are not 'evidence' under this definition as not being made by a witness. Where, however, the answers of an accused person are used against him, as they may be, in another trial, the record of them would be strictly "evidence" as being a "document produced for the inspection of the Court." So also would be the examination of the accused before the Committing Magistrate when given in evidence at the Sessions trial. Where one of several accused persons makes a confession involving himself and some of the co-accused, it may "be taken into consideration" as against all the persons so involved; see *post*, Section 30. Such statements are excluded from the definition of evidence probably to mark the smaller degree of credibility, as a general rule, attaching to them.

Besides the facts proved, there are also certain notorious facts, of which, without proof, the Court takes judicial notice, Section 57, facts which the parties admit, Section 58, and facts which the Court either must or may presume.

Material objects.—Another important ingredient of belief, which does not fall within the definition of 'evidence' is the Judge's own observation of the witness' demeanor and appearance. It has been objected that the Act omits reference to a third class of evidence, *viz.* the evidence of things actually produced for the ocular inspection of the Court. Provision is, however, made for this matter in the last clause of Section 60, where it is enacted that, wherever oral evidence is given about the existence or condition of a material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection. The reason for the omission of things so produced, as a distinct class, is that they cannot form part of the facts of the case except by means of oral evidence, and so properly fall under it.

Carrying out the principle of Section 60, the Criminal Procedure Code, Section 218, directs the transmission to the High or Sessions

Court. by the Committing Magistrate, of weapons or other articles of property, to which the evidence refers.

Judge not to import his own knowledge.—A Judge, must proceed upon facts proved, not upon his own knowledge of particular facts. If he wishes to import such knowledge into the case, he must give evidence as a witness. Such knowledge, the Judicial Committee have observed, would, if properly tested, probably turn out to depend on mere hearsay or rumour and to be inadmissible. *Haro Persad v. Sheo Dyal*, 11 M.L.A., 213.

Local Investigation.—A Judge, however, in civil cases, and the Jury and Assessors in criminal cases, Cr. P. C., s. 298, may inspect the locality with which the evidence is concerned.

Where a muniff visited a locality as to the boundaries of which there was a dispute his investigations supplied a proper basis for a judicial decision; but judicial officers conducting local investigations should record their result as soon as they are completed, so that parties may have a chance of seeing what facts they consider to be established; *Jay Coomer v. Bunkhoo Lall*, I.L.R., 9 Cal., 368. A Magistrate cannot be witness in a case in which he is sole judge of law and fact: *Empress v. Donnelly* I.L.R., 2 Cal., 405. Where a Magistrate had investigated the scene of a boundary dispute and had acquired information which was not admissible as evidence, it was held that he ought not to try the case; he could not put his notes in as evidence and submit himself to cross-examination; if a Magistrate holds an enquiry at the site of the occurrence instead of in his own Court he should receive no evidence which is not protected by all the safeguards by which evidence is protected by law. *Hari Kishore Mitra v. Abdul Baki Miah*, I.L.R., 21 Cal., 920.

(6) **“Proved.”**—Absolute certainty amounting to demonstration, is seldom to be had in the affairs of life, and we are frequently obliged to act on degrees of probability which fall very far short of it indeed. Practical good sense and prudence consist mainly in judging aright whether in each particular case the degree of probability is so high as to justify one in regarding it as certainty and acting accordingly. A merchant receives intelligence that some firm is solvent, or that the rate of exchange will vary, or that some change in the tariff will be introduced: a General gets some information about the movements or resources of the enemy: the success of either will depend on his judging soundly and well when he ought to act on the assumption that what he hears is true, or when prudence bids him assume it to be false. If he waited for absolute certainty, he would never act at all. In like manner all that a Judge need look for is such a high degree of probability that a

prudent man, in any other transaction where the consequences of mistake were equally important, would act on the assumption that the thing was true. The section is so worded as to provide for two conditions of mind, first, that in which a man feels absolutely certain of a fact, in other words "believes it to exist;" and, secondly, that in which, though he may not feel absolutely certain of a fact, he thinks it so extremely probable that a prudent man would, under the circumstances, act on the assumption of its existence.

A distinction has some times been drawn between the probative effects of evidence in civil and in criminal cases, and the doctrine has been laid down that a fact may be regarded as proved for civil purposes, though the evidence would not sustain it for the purpose of a criminal conviction. "There is," says Mr. Best, (§ 95) "a strong and marked difference as to the effect of evidence in civil and criminal proceedings." In the former, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision; but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. The serious consequences of an erroneous condemnation both to the accused and society, the immeasurably greater evils which flow from it than from an erroneous acquittal, have induced the laws of every wise and civilized nation to lay down the principle, never to be lost sight of in practice, that the presumption of guilt ought to amount to a moral certainty or, as an eminent Judge, still living, expressed it, 'such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt.'

The true ground of the distinction between civil and criminal proceedings in this respect appears to be that in civil proceedings the Court must decide for one party or another, and may consequently have to declare one party's right on what it feels to be very inadequate grounds: but in criminal cases it is no question of balancing conflicting rights, but of deciding whether the facts raise a strong enough probability of the prisoner's guilt to justify his punishment. The present section lays down the rule that the probability in civil and criminal cases alike must be such that a prudent man ought, in the circumstances of the case, to act on the supposition of the thing being true.

4. Whenever it is provided by this Act that the Court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it. "May presume."

"Shall presume."

Whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

"Conclusive proof."

When one fact is declared by this Act to be conclusive proof of another, the Court shall on proof of the one fact regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

Note.

Distinction between presumptions of fact and presumptions of law abolished.—The effect of this section is to do away with the distinction known to English law between presumptions of fact and presumptions of law: presumptions of fact being those natural inferences which our experience of the world around us leads us to draw from certain facts: presumptions of law being certain artificial inferences which, either from their recognized probability, or for some other cause, the law directs to be drawn from certain facts. The matter was further complicated by the recognition in English Text Books of a third class, mixed presumptions of law and fact, cases in which the presumption was partly natural and partly artificial. Under the present Act these distinctions are got rid of, and all presumptions are made to fall under one or other of the three classes mentioned in the present section.

"May presume."—The first and by far the largest class includes all those natural inferences which the "common course of natural events, human conduct and private and public business" suggest to us. Our experience of the world, for instance, leads us to infer that a man, who is in possession of stolen goods shortly after the theft and can give no account of them, either is the thief or has received the goods knowing them to be stolen; our knowledge of the regularity with which public business proceeds leads us to infer that an official act has been regularly performed: our knowledge of human nature leads us to infer that a man, who does answer a question, could not answer it in a manner favourable to himself. Such inferences are formed, not by virtue of any law, but by the spontaneous operation of the reasoning faculty: all that the law does for them is to recognize the propriety of their being so drawn, if the Judge think fit. The Court *may* presume them, *i.e.*, may either draw the inference, which the facts suggest, at once, and call on the opposite party to disprove it, or may refuse to draw the inference and call for proof of it, independently of the facts by which the inference

was suggested. Thus, in the case of a man found in possession of stolen goods shortly after the theft and unable to account for his possession, the Court may either presume the guilt of the accused and throw upon him the onus of proving his innocence; or it may refuse to presume his guilt and may throw upon the prosecution the burden of proving it.

Besides these natural presumptions there are several instances of presumptions as to documents dealt with in Sections 86—88, and 90, in which the Court is, in like manner, empowered to throw the burden of proof on which party it pleases, to presume a fact or to call for proof of it, as it thinks best. See also § 114.

“Shall presume.”—The next class consists of those cases in which the Court *shall* presume a fact. Here no option is left to the Court, but it is bound to take the fact as proved until evidence is given to disprove it, and the party interested in disproving it must produce such evidence if he can. Presumptions of this sort arise chiefly as follows: (1) where from the nature of the case the truth of the thing presumed is in a high degree probable, as, for instance, the genuineness of a document purporting to be the *Gazette of India*, or of a duly signed record of evidence; or else (2) when it is the policy of the law to assume certain things until they are disproved, as, for instance, that a document, called for and not produced, was duly stamped, attested, and executed (Section 89), or that circumstances bringing an offence within the exceptions to the Indian Penal Code do not exist. (Section 105.) See §§ 79—85.

“Conclusive proof.”—The third class is of those cases in which one fact is “conclusive proof” of another. An artificial probative effect is given by the law to certain facts, and no evidence is allowed to be produced with a view of combating that effect. These cases generally occur where it is against the policy of Government or the interests of society, that a matter should be further open to dispute. Thus Judgments of certain courts are conclusive proof of the matters stated in them (Section 41): a birth during a valid marriage is, with certain exceptions, conclusive proof of legitimacy: and a notification in the *Gazette of India* of a cession of British Territory is conclusive proof of a valid cession having taken place. (Section 118.)

See too Section 5 of the Foreign Jurisdiction and Extradition Act 1879, Act XXI of 1879, making a notification in the *Gazette* of the exercise of certain powers by the Governor-General conclusive proof of its contents.

Sometimes a fact may be “conclusive proof” only in particular circumstances. For instance, a Bill of Lading in the hands of a

consignee or indorsee for valuable consideration, representing goods to have been shipped, is conclusive evidence of such shipment as against the Master or other person signing the same, unless the holder of the bill had notice that the goods were not laden. The Master or other person signing the bill may exonerate himself by showing that the mistake was caused, without any default on his part, and wholly by the fraud of the shipper, or holder, or some person under whom the holder claims; Act IX of 1856, Section 3. Where the Bill of Lading gives him clear notice that the Master, upon whose signature he is supposed to rely, does not admit that the amount mentioned in the Bill of Lading was shipped—as where the words “weight, contents and value unknown” are inserted—the Bill of Lading is not conclusive evidence against the Master of the shipment of the goods specified in the Bill of Lading.—*W. Nicol & Co. v. Castle*, 9 Bom. H. C. Rep., 321. See §§ 41, 112 and 113.

The subject of presumptions is dealt with at length in the note to Section 114.

CHAPTER II.

OF THE RELEVANCY OF FACTS.

Evidence may be given of facts in issue and relevant facts.

5. Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue and of such other facts as are hereinafter declared to be relevant, and of no others.⁽¹⁾

Explanation.—This section shall not enable any person to give evidence of a fact which he is disentitled to prove by any provision of the law for the time being in force relating to Civil Procedure.⁽²⁾

Illustrations.

(a) A is tried for the murder of B by beating him with a club with the intention of causing his death.

At A's trial the following facts are in issue—

A's beating B with the club;

A's causing B's death by such beating;

A's intention to cause B's death.

(b) A suitor does not bring with him, and have in readiness for production at the first hearing of the case, a bond on which

he relies. This section does not enable him to produce the bond or prove its contents at a subsequent stage of the proceedings, otherwise than in accordance with the conditions prescribed by the Code of Civil Procedure.

Note.

(1) **Evidence may be given of facts in issue and relevant facts only.**—Relevant facts having been defined in Section 3 as facts connected with one another in any of the ways referred to in the provisions of the Act as to relevancy, the present chapter sets out the ways in which facts must be connected with each other in order to be relevant; and this section lays down a general rule as to the admissibility of evidence by enacting that evidence may be given of (a) facts in issue, and (b) facts declared to be relevant, and of no others. As to the meaning of “fact in issue,” see Section 3. Each of the facts mentioned in Illustration (a) being facts in issue, inasmuch as, taken together, they establish the liability of A to be convicted of murder (see Section 3), evidence of them may be given.

The remaining sections of the chapter give illustrations of relevant facts. The permission to give evidence of relevant facts accorded in this section must be taken subject to the restrictions provided in Part II as to proof. For instance, an oral contract between two parties might be relevant under this chapter, but evidence of it might be excluded, under Section 91, by the fact of the contract having been reduced to writing, or by the fact of the agreement being one required by law to be in writing. So, again, a contemporaneous, oral modification of a written contract might be relevant under this chapter, but it would be excluded by Section 92. In like manner evidence of relevant facts might be excluded by the rules as to estoppel in Chapter 8, or by the rules imposing silence on various classes of persons contained in Sections 121—127.

There are some facts besides those mentioned in the chapter of which evidence may be given. The word ‘hereinafter’ in the first paragraph, must be read as including not only this Chapter (Sections 5—55,) but Sections 145, 146, 148, 153, 155, 156, 157, 158.

(2) **Provisions of Code of Civil Procedure unaffected.**—See Civil Procedure Code, 1882, Sections 59, 60, 62, 68, 188 & 189, as to original hearings, and 568 as to appeals.

6. Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they

Relevancy of facts forming part of same transaction.

occurred at the same time and place or at different times and places.

Illustrations.

(a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the bystanders at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact.

(b) A is accused of waging war against the Queen by taking part in an armed insurrection in which property is destroyed, troops are attacked, and gaols are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.

(c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.

(d) The question is whether certain goods ordered from B were delivered to A. The goods were delivered to several intermediate persons successively. Each delivery is a relevant fact.

Note.

Facts forming part of the same transactions.—These are facts which are described in the Text Books as being part of the "*res gestæ*." The rule, as given by Sir James Stephen, is that every fact which is a part of the same "transaction" is relevant: and a "transaction" is defined as "a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong, or any other subject of inquiry which may be in issue."—Steph. Digest, Art. 3. The expression 'form part of the same transaction' is somewhat vague, and is intended to throw on the Judge the task of deciding whether the facts to be proved and the facts in issue are so closely and immediately connected with each other as practically to constitute a single group, each part of which must be considered in order to understand the rest.

This vagueness corresponds to a similar uncertainty in English Law: "Whether any particular fact," says Sir J. Stephen, "is or is not part of the same transaction as the facts in issue is a question of law upon which no principle has been stated by authority and on which single Judges have given different

"decisions." This is illustrated by the curious fact that there was a difference of opinion between Cockburn, C. J., and Mr. Pitt Taylor in a case in which the question was whether A cut B's throat, or whether B cut it herself, and it was proposed to give in evidence a statement made by B, when running out of the room immediately after her throat was cut. The statement was not allowed by the Chief Justice to be proved; *R. v. Bedingfield*, 14 Cox C. C. 341. Mr. Pitt Taylor maintained that its exclusion was wrong. The statement would clearly be relevant under Section 32 of the present Act.

Contemporaneous statements are often, of course, "facts forming part of the transaction" to which they relate; and might with equal propriety be shown to be relevant under this section, or Sections 8, 9, or 14. Thus, in Lord George Gordon's trial for treason, 21 State Trials 542, it became necessary to enquire whether certain proceedings, in which a riotous mob was headed by the accused, amounted to the offence charged; and the cries of the mob were admitted as evidence against him. So, in O'Connell's trial, 5 State Trials N. S. at p. 278, where the accused was charged with summoning monster meetings for an illegal purpose, papers publicly sold at the meetings, were received in evidence of his objects, though no evidence was given connecting the accused with the sale or with the persons selling.—*Tayl.*, §§ 583. 592.

So, again, where the buyer bought of the sellers, stating that he bought for G. & Co., and, as to his trustworthiness, referred the vendors to B; and in a suit the question arose whether the buyer bought on his own behalf or on account of G. & Co., the Court of Exchequer held that a letter from the sellers to their agent, directing him to make enquiries of B concerning the buyer, and stating that they (the sellers) had sold the goods on account of G. & Co., was admissible, to prove that the sellers had sold on the credit of G. & Co., and not on that of the buyer; *Milne v. Leisler*, 31 L. J., Ex., 257. Such a letter might be shown to be relevant, according to the present Act, under this section, or Section 8, 9 or 14, or under Section 21. Sometimes acts may 'form part of the same transaction' though they occur at distant places or different times; when, for instance, a man committed three burglaries in one night, and stole a shirt in one place and left it in another, evidence of all these burglaries was admitted, on the ground that "if several and distinct offences do so intermix and blend themselves with each other, the detail of the party's whole conduct must be pursued." *Per* Lord Ellenborough, C. J. in *R. v. Whorley*, 2 Leach, 988, 985.

Illustration (a) shows that the admissibility of statements of bystanders will depend, not, as is the general rule in English Law,

on the question whether the party, against whom the evidence is given, was present when the statement was made ; but on the question whether the statement was made so shortly before or after the transaction as to form part of it. The mere fact of the accused not being present would not be ground for its exclusion. Sometimes such statements are the best possible evidence. Suppose, for instance, that the question is whether A committed a murder at a particular house and time : a number of men are sitting in a room, one of them, B, looks out of the window, and says, "there goes A ;" immediately afterwards screams are heard, the men rush out, and find the murdered person's corpse and the murderer fled. B's statement would be relevant as part of the transaction. It would also be admissible under Section 157 by way of corroborating B's evidence.

A statement by a man, who has been run over by another, made immediately after the accident has been admitted in England ; *R. v. Foster*, 1 C. & P., 325.

A statement made by the injured person, in the presence of the accused, immediately after the commission of the offence, was held to be relevant, in *In re Surat Dhobni*, I. L. R., 10 Cal., 802. It would also be relevant under § 8, III. (g).

On the analogy of this rule it has been held that, where from the contiguity of two places it may be presumed that rights, claimed over them by a person, were created by the same transaction, the nature or extent of the right in one of the places is relevant for the purpose of showing its nature or extent in another. Thus when the question is whether A, the owner of one side of a river, owns the entire bed of it, or only half the bed at a particular spot, the fact that he owns the entire bed a little lower down is relevant ; *Jones v. Williams*, 2 M. & W., 326. So in order to prove the right of the Lord of the Manor to a slip of land by the roadside, his ownership of the slip of land in other parts of the same road is relevant. *Doe v. Kemp*, 7 Bing. 332 ; 2 Bing. N. C. 102. Steph. Digest, Art. 8. Illustrations (d) and (e).

Facts which are occasion, cause, or effect of facts in issue.

7. Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts, or facts in issue, or which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.

Illustrations.

(a) The question is, whether A robbed B.

The facts that, shortly before the robbery, B went to a fair with money in his possession, and that he showed it, or mentioned the fact that he had it, to third persons, are relevant.

(b) The question is, whether A murdered B.

Marks on the ground, produced by a struggle at or near the place where the murder was alleged to have been committed, are relevant facts.

(c) The question is, whether A poisoned B.

The state of B's health before the symptoms ascribed to poison, and habits of B, known to A, which afforded an opportunity for the administration of poison, are relevant facts.

Note.

Facts which are the occasion, cause, or effect of facts in issue.

—Every fact is connected with numberless other facts by ties more or less close. It may often be difficult for a judge to say whether a fact can or cannot be properly said to “form part of a transaction” within the meaning of Section 6. Section 7 meets this difficulty by embracing a larger area of facts. Leaving the transaction itself, it provides for the admission of several classes of facts, which, though not, possibly, forming part of the transaction, are yet connected with it in particular modes, and so are relevant when the transaction itself is under enquiry. These modes of connection are (1), as being the occasion or cause of a fact; (2), as being its effect; (3), as giving opportunity for its occurrence; (4), as constituting the state of things under which it happened. They are in truth different aspects of causation, and the reason for the admission of facts of this nature is that, if you want to decide whether a thing occurred or not, almost the first natural step is to see whether there were facts at hand calculated to produce or afford opportunity for its occurrence, or facts which its occurrence was calculated to produce. In order, moreover, properly to appreciate a fact it is necessary to know the state of things in which it occurred. For all these points the present section provides.

Illustration (a) is an instance of facts relevant as giving occasion or opportunity: (b) of facts constituting an effect: (c) of facts constituting the state of things under which an alleged fact happened.

In the trial of Captain Donnellan for poisoning Sir Theodosius Broughton with distilled laurel water, it was proved that Sir Theodosius was ill at the time of a trifling complaint for which he

was taking medicine; that laurel leaves were to be had in the garden; that the accused frequently practised distillation in a room which he kept locked up: that Sir Theodosius used to lock up the phials containing his medicine in an inner room; and that, having on one occasion forgotten to take it, he was recommended by Donnellan to leave it in an outer room; that Donnellan had an interest in Sir Theodosius' death, and took opportunities of falsely representing his health to be far worse than it really was. All these would be relevant facts under this and the following section.—*Benth. Rationale Evid*, vii, 19 See also Sir J Stephen's analysis of the grounds on which Mr. Froude believes that Mary Queen of Scots murdered her husband, given in his speech quoted in the Appendix, p. 385.

Motive preparation, and previous or subsequent conduct.

3. Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.⁽¹⁾

Explanation 1.—The word “conduct” in this section does not include statements, unless those statements accompany and explain acts other than statements: but this explanation is not to affect the relevancy of statements under any other section of this Act.⁽²⁾

Explanation 2.—When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.⁽³⁾

Illustrations.

(a) A is tried for the murder of B.

The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(b) A sues B upon a bond for the payment of money. B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

(c) A is tried for the murder of B by poison.

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

(d) The question is whether a certain document is the will of A.

The facts that, not long before the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will relate, that he consulted vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(e) A is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence—'the police are coming to look for the man who robbed B,'—and that immediately afterwards A ran away, are relevant.

(g) The question is, whether A owes B rupees 10,000.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing—'I advise you not to trust A, for he owes B 10,000 rupees,'—and that A went away without making any answer, are relevant facts.

(h) The question is, whether A committed a crime.

The fact that A absconded after receiving a letter warning him that enquiry was being made for the criminal, and the contents of the letter, are relevant.

(i) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is, whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant as conduct under this section, though it may be relevant

as a dying declaration under section thirty-two, clause (1), or as corroborative evidence under section one hundred and fifty-seven.

(k) The question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which (4), the complaint was made, are relevant.

The fact that he said he had been robbed without making any complaint is not relevant as conduct under this section, though it may be relevant

as a dying declaration under section thirty-two, clause (1), or as corroborative evidence under section one hundred and fifty-seven.

Note.

(1) **Motive, preparation, and conduct.**—This section is an amplification of the preceding one. In the consideration of the cause or occasion of a fact, or the state of things under which it happened, nothing can be more material than to know whether any person had an interest in its happening, or took any measures calculated to bring it about. Thus motive and preparation become of the utmost importance. If A is found murdered, the fact that B had a strong motive for wishing A dead is, so far as it goes, a piece of evidence against B.

So, if A is poisoned with arsenic, the fact that B, shortly before, procured arsenic, or made arrangements by which he would have access to A's food, points, in a measure, to B being the poisoner, and would be a relevant fact at his trial.

Of the Illustrations, (a) and (b) show motive; (c) and (d) preparation; (e) and (i) show conduct of a party to the proceeding in reference thereto; (f), (g) and (h) are specimens of statements made to or in the hearing of a person, whose conduct is relevant, influencing such conduct; (j) and (k) are specimens of statements accompanying and explaining the conduct of a person, an offence against whom is being enquired into. The absence of the accused at the time when a complaint is made against him, in cases coming within Illustration (k), does not affect the relevancy of such complaint and therefore does not exclude it; *Reg. v. Macdonald*, 10 B. L. R., App. 2. The statement becomes relevant under this section, as accompanying and explaining the conduct of the party in making a complaint. By English law the details of the statement in such cases can be elicited only in cross-examination.—*Tayl.*, § 581, and see Stephen's Dig. Note V. This restriction does not apply to proceedings regulated by the present Act, see *R. v. Macdonald*, *supra*.

An act may often may be relevant as showing motive or preparation though it is entirely distinct from the transaction under enquiry: for instance, where an action on a policy of insurance, effected by a person on his own life, was defended on the ground that he had no interest in the policy, the fact that, previous to the insurance, the deceased had consulted another person about effecting a policy on his own life was admitted; *Shilling v. The Accidental Death Company*, 4 Jur., N. S., 244. Such a fact would be relevant under the present section.

(2) **Statements accompanying and explaining acts.**—Express provision is made for statements of various kinds; Section 10, deals with statements by conspirators; Section 14, statements showing state of mind or body, Illustrations (k) (l) (m); Sections 17—31, admissions; Sections 32—38, various statements by deceased persons and others; Sections 155 and 157, former statements of witnesses. The present section admits statements only so far as they accompany and explain acts. Thus in (j) if a woman goes and makes a complaint to her parents or other person of having been raped, the fact of such a complaint having been made is relevant under this section, and so is what she said in so complaining. Her mere statement of having been ravished, apart from the act of making a complaint, would, so far as the present section is concerned, be inadmissible; but it would probably be relevant under one or other of the provisions just mentioned. Statements in the nature of a confession by a prisoner which led

to the discovery of stolen property are not admissible as evidence of conduct under this section which must be read in connection with §§ 25 & 26 *post*; *Queen Empress v. Nana*, I. L. R., 14 Bom., 260.

(3) **Statements affecting conduct.**—The provision contained in Explanation 2 lets in an important class of statements, those, namely, made too or in the presence of a party whose conduct is in question, and which can be shown in any way to affect such conduct. The illustrations given in (f), (g) and (h) show how important such statements may be in throwing light upon a person's motives, intention, good faith, &c. Silence is, in certain circumstances, tantamount to assent. Thus, where a Judge at a trial made a proposal as to the course of proceedings, in the presence of counsel who raised no objection, it was held not open to counsel subsequently to question the propriety of the course to which he had impliedly given his assent: *Morrish v. Murrey*, 13 M. & W., 52: so, "if a client be present in Court and stand by and see his solicitor enter into terms of an agreement, he is not at liberty afterwards to repudiate it" *Per* Sir J. Romilly, M. R., in *Swinfen v. Swinfen*, 24 Beav., 549, 559. Care must, however, be taken not to apply the doctrine that "He who keeps silence, consents" too freely, or to infer that because a man does not choose, on a particular occasion, to deny the truth of a thing, he is to be taken as impliedly admitting it. A more correct statement of the rule to be applied to such cases is "Qui tacet non utique fatetur, sed tamen verum est eum non negare." There is, it is true, the fact that the person has not denied the statement, but there may be excellent reasons for his refraining from so doing. A statement may be a mere impertinence and best rebuked by silence; and especially when the observations are not addressed to a man himself, but are merely made in his presence, he may be under no obligation to take any notice of them. This is still more the case when the statement is made, not by a person interested in the proceedings, but by a mere stranger. In such a case it may naturally be left uncontradicted, and a Judge would be acting very rashly who inferred acquiescence from silence. Again, statements may be made in a man's presence, to which, from the circumstances of the case, he has no opportunity of replying, and as to which, therefore, no inference can be drawn from his silence, *e.g.*, depositions in Court. In the same way, statements to a man by letter may often be shown to affect his conduct and may be most useful in explaining it: but here again great caution is necessary in drawing any inference from his silence. "What is said to a man before his face," observed Lord Tenterden in *Fairlie v. Denton*, 8 C. & P., 103 "he is in some degree called on to contradict, if he does not

acquiesce in it; but the not answering a letter is quite different; and it is too much to say, that a man, by omitting to answer a letter, at all events, admits the truth of the statements that letter contains."—*Tayl.*, § 811.

But the statements whether oral or written must be shown "to affect the conduct" of the person to whom they are made, and, therefore, mere statements to a person, which cannot be shown to be in any way connected with or to bear upon his conduct, would be inadmissible. This point was much discussed in the well known case of *Wright v. Doe d. Tatham*, 7 A. & E., 313, where the question was as to the sanity of a testator at the time of making his will and as to the admissibility of certain letters addressed to the testator, but not shown to have been acted upon by him, as evidence of his sanity. "In order to determine that question," said Tindal. C. J., (page 400) "I conceive all that was said, written, or done by the testator himself at any time during such period was the most direct and the best evidence to ascertain the state of his understanding; and that the next in degree, because intimately connected with it, would be all that was said to him, written to him, and done to him during the same period, by his friends and others who had access to him, *provided always, that what was so said, written, or done to him by others, is shown to have come to his actual knowledge*; but I consider this condition to be indispensable as to the admissibility of this second class of evidence; for, as to what was *said by others* but not heard by the party whose understanding is the subject-matter of enquiry, or *written by others*, but which never reached him, or *done by others* but never known by him to have been done, it appears to me that such speaking or such writing or such acting, can amount to no more than an *expression of the opinion* of the speaker, or the writer, or the actor, and that such opinion, not having been given upon oath, and not being subject to cross-examination as to the grounds upon which it was originally formed or continued, cannot, on that account, be deemed admissible in evidence" In Explanation 2 of the present section the words "statement made to him" would, of course, include letters addressed to a person and shown to have come to his knowledge. The relevancy of such letters would depend upon whether they could be shown in any way to be such as to affect his conduct.

In Sir J. Stephen's Digest, Art. 8, declares the relevancy of statements made in a person's presence and hearing "by which his conduct is likely to have been affected;" and this is no doubt the more correct expression. 'Affects' in the section must be read as equivalent to 'has a bearing upon.' Sometimes as, *e.g.*, in Illustration (g) the point is that a person's conduct is *not* affected,

in the sense of being modified, inasmuch as he allows a statement to go uncontradicted.

(4) It seems that the terms of the complaint mentioned in Illustration (1) may be given in evidence; *Reg. v. Macdonald*, 10 B. L. R., App., 2. By English law the prosecution would not be allowed to do more than ask whether a complaint was made and what was done in consequence of that complaint, see Taylor, § 519 and Stephen's Dig. Note V.

Facts necessary to explain or introduce relevant facts.

9. Facts necessary to explain or introduce⁽¹⁾ a fact in issue or relevant fact, or which support or rebut an inference⁽²⁾ suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

Illustrations.

(a) The question is whether a given document is the will of A. The state of A's property and of his family at the date of the alleged will may be relevant facts.

(b) A sues B for a libel imputing disgraceful conduct to A. B affirms that the matter alleged to be libellous is true.

The position and relations of the parties at the time when the libel was published may be relevant facts as introductory to the facts in issue.

The particulars of a dispute between A and B about a matter unconnected with the alleged libel are irrelevant, though the fact that there was a dispute may be relevant if it affected the relations between A and B.

(c) A is accused of a crime.

The fact that, soon after the commission of the crime, A absconded from his house, is relevant, under section eight, as conduct subsequent to and affected by facts in issue.

The fact that, at the time when he left home, he had sudden and urgent business at the place to which he went, is relevant as tending to explain the fact that he left home suddenly.

The details of the business on which he left are not relevant, except in so far as they are necessary to show that the business was sudden and urgent.

(d) A sues B for inducing C to break a contract of service made by him with A. C, on leaving A's service, says to A—'I am leaving you because B has made me a better offer.' This statement is a relevant fact as explanatory of C's conduct, which is relevant as a fact in issue.

(e) A, accused of theft, is seen to give the stolen property to B, who is seen to give it to A's wife. B says, as he delivers it—'A says you are to hide this.' B's statement is relevant as explanatory of a fact which is part of the transaction.

(f) A is tried for a riot and is proved to have marched at the head of a mob. The cries of the mob are relevant as explanatory of the nature of the transaction.

Note.

(1) **Facts explanatory of relevant facts.**—Having, in the previous sections, disposed of facts which are relevant as having, in one way or other, *caused* a fact relevant or in issue, or constituted the state of things under which it occurred, we now come to facts which are relevant either (1) as *explaining* or *introducing* a fact relevant or in issue, of which Illustrations are given in (a) (b) (d) (e) and (f); or, (2) as supporting or rebutting an inference suggested by any such fact, as in Illustration (c) where evidence may be given of facts to rebut the inference suggested by A's sudden departure; or (3) to establish the identity of any person, or to fix the time or place at which anything happened, when these points are relevant or in issue: or (4) to show the relation of the parties. As sections 7 and 8 provided for facts *causative* of a fact relevant or in issue, this section may be said generally to provide for facts *explanatory* of any such fact. It will be observed that, if a statement can be shown to be thus explanatory, it is admissible, perfectly irrespectively of whether the person against whom it is given heard it or was present when it was made. Thus, in Illustrations (d) (e) and (f) the person affected may have been perfectly unconscious of the statement: none the less is it admissible against him as explanatory of a fact in issue or relevant.

It has been objected that "to allow such statements to be relevant, without some proof of authority given, by the parties to be affected, to those making the statements, is to introduce a dangerous innovation, whereby persons may suffer in life, person or property, by statements put into their mouths from behind their

backs: a principle which the Law of Evidence has hitherto eschewed." Whether this is a dangerous innovation is a matter of opinion: the framers of the Act apparently thought otherwise. They may have considered that, though such statements might weigh heavily against a man on some occasions, they might weigh strongly in his favour on others, and that, if evidence of a fact is to be given at all, it is desirable that what was said about it at the time of its occurrence should be proved as well as the other parts of the transaction. At any rate there is no question as to their admissibility under the present section.

(2) **Facts which support or rebut an inference suggested by relevant facts.**—It is frequently of the utmost importance to get rid of inferences which the facts of the case, unexplained, legitimately suggest. In Illustration (c) it was material, as bearing on A's innocence, for him to explain his sudden departure. Circumstances often so occur as to raise a strong suspicion against a man, and any fact which tends to dispel that suspicion is relevant. Thus, in a case in which the question was whether A had stolen some chaff from B, B gave evidence that the chaff found at A's house was similar to that lost by B; and that in both there was linseed. A was allowed to give evidence to explain the presence of linseed in the chaff found with him and so rebut the inference suggested by its presence; *Wright v. Wilcox*, 19 L. J., C. P. 333. An example of Illustration (f) is found in Lord George Gordon's Trial; 21 St. Tr. 542; *Tayl.*, § 583.

Things said or done by conspirator in reference to common design.

10. Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.

Illustration.

(a) Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen.

The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Calcutta for a like object, D persuaded persons to join the conspiracy in Bombay, E published writings advocating the object in view at Agra, and F transmitted from Delhi to G at Cabul the money which C had collected at Calcutta, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy, and to prove A's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.

Note.

Things said or done by a conspirator in reference to common design.—The provisions of this section are considerably wider than the English Law. Not only are statements made by one conspirator *in furtherance of the common design* relevant as against the other conspirators; but anything said, done or written by any conspirator *in reference to the common design*, is relevant against any other person who is reasonably believed to have joined in the conspiracy, although such thing may have been said, written or done before he joined the conspiracy, or after he left it. A mere narrative of the plot would be admissible; and so would papers, written by one of the conspirators about the plot, although such papers may not have been in existence when the accused was taken into custody. In England only statements of conspirators *in furtherance of the common design* can be proved, and important evidence is often shut out; thus a letter written by a conspirator to a friend, giving an account of his own share in the conspiracy but not intended to further the common object, has been excluded; *R. v. Hardy*, 24 St. Tr. 451—3.

In another case on the trial of A and B for conspiring to cause imported goods to be carried away without payment of duty, with intent to defraud the revenue, it was proposed to use as evidence against B, the counterfoil of A's cheque book, which purported to show that part of the duty, of which the customs had been defrauded, had been paid to B. This was excluded as not being an act done in pursuance of the conspiracy, but a mere statement of the result of the conspiracy; *R. v. Blake*, 6 Q. B., N. S., 126. Such evidence would be admissible under the present section. The statement, however, must refer specifically to the common design, and not merely to the subjects with which the design may

be remotely connected. Thus "in *Algernon Sidney's case*, 1688, observed upon *Albott, J.* in *R. v. Watson*, 1817, a treatise containing speculative republican doctrines, which not only was unpublished and unconnected with the treasonable practices of which he was accused, but had been composed several years before the trial, was indeed, admitted in evidence (*Jeffreys, J.*). But subsequent times have regarded this trial as a judicial murder." *Tayl.*, § 596 (n). The present section removes any doubt, if any could exist, of the inadmissibility of such evidence.

There can be no doubt that the section was intended to extend the rule of English law. It contains an express provision as to *time*, viz., that the thing to be proved must have been said, done or written *after the time when the intention of the conspiracy was first entertained by one of the conspirators*: and an express provision as to the *nature of the thing*, viz., that it must have been said, done or written *in reference to the common intention*. So long as the proposed piece of evidence fulfils these two requirements the language of the section renders it admissible, and an exclusion of evidence with reference to the fact of the conspiracy having ceased would be an introduction of English law, for which the present Act contains no sanction. So far as the reason of the thing is concerned, the advantage seems to lie with the Indian enactment. Five men, for instance, conspire to commit a burglary, the burglary is committed—the stolen property is disposed of and the proceeds deposited in a bank. Each of the burglars on getting home, confesses to the commission of the offence and names his companions—is it reasonable or unreasonable to exclude such evidence?

The section extends also to persons who have conspired to commit an actionable wrong, and, therefore, the statements of one co-trespasser, if there is a reasonable ground for believing a conspiracy to commit trespass to have existed, are admissible against the other co-trespassers.

It is to be observed that in order to bring the section into operation there must be, in the first place, *reasonable ground to believe in the existence of the conspiracy*. That being shown, any of the facts mentioned in the section are relevant, as well to prove the existence of the conspiracy, as to implicate each of the conspirators. If there was *prima facie* evidence that two or more persons were acting in concert to a common end, or if, supposing concert not to be directly proved, their acts so dove-tailed into and supplemented each other as to produce a particular result not likely to be produced without a previous design, this would, I imagine, be reasonable ground for believing in the existence of a conspiracy within the meaning of the section. By the last paragraph of

Section 136 it is in the discretion of the Court to call for evidence of there being reasonable grounds for believing in the existence of the conspiracy in the first instance, or to allow of the alleged acts or statements of the alleged conspirators being first proved.

As to things *done* by a conspirator with reference to the common design, it is often necessary to prove the acts of one person in order to explain the conduct or intention of another with whom he is acting jointly. Thus, where A and B went together to a shop and A tendered a counterfeit coin, evidence of B having a number of counterfeit coins, wrapped up in a paper, on her person, was admitted to show a guilty knowledge on the part of A, though no counterfeit coin had been found on A; *R. v. Skerrett*, 2 C. & P. 427.

11. Facts not otherwise relevant are relevant—

When facts not otherwise relevant become relevant.

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations.

(a) The question is, whether A committed a crime at Calcutta on a certain day.

The fact that on that day A was at Lahore, is relevant.

The fact that near the time when the crime was committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C or D, is relevant.

Note.

Relevancy of Inconsistent facts.—This section is of importance to the party whose object it is to *disprove* some fact which is asserted by the opposite side. There may be facts which have no connection with an alleged circumstance, except that they show it to be

impossible or so highly improbable as to justify the inference that it never occurred. Of this an *alibi* is the most familiar instance. There may, on the other hand, be facts which though not forming part of the transaction, yet make the fact of its having occurred a matter of certainty. A warder, for instance, is locked up with five prisoners in a jail. He is found murdered. The facts that there was no one else in the jail, that no one could have got in, that three of the five prisoners were chained up in cells, and a 4th was lying paralyzed in bed, are relevant as proving that the murder was committed by the 5th prisoner. Such facts might, with equal propriety, be proved under Section 7, as constituting the state of things under which a fact, in issue or relevant, occurred, or as having afforded an occasion for its occurrence.

"Inconsistent."—"Highly probable or improbable."—Care must be taken not to give this section an improperly wide scope by a too liberal interpretation of the words "inconsistent" and "highly probable or improbable." Otherwise the section might seem to contain in itself and to supersede all the other provisions of the Act as to relevancy. The illustrations show that the inconsistency referred to means a physical impossibility of the co-existence of two facts, as that a man should be in two places at the same time or within an interval of time too short to allow of his transit by any known means of locomotion from one to the other: by "highly improbable" is meant something, which, though not absolutely impossible, is almost equivalent to it. A man might be at such a distance from the scene of an offence as to make it, though not physically impossible, yet in the highest degree improbable that he could have been present at its occurrence: the fact that he was at such a distance would be a material consideration in forming an opinion as to whether he committed it, and would be relevant. Under this section evidence might be given of the sort of inconsistencies which are so frequently the means of exposing a false story. Where S. and S. swore that they saw the accused at W., D. and J. were allowed to give evidence to show that it was highly improbable that they were there; *R. v. Sakharam Nukundji*, 11 Bom., 166. A judicial decision is not a fact under this section; *Gujju Lall v. Futteh Lall*, I. L. R., 6 Cal., 171: see too *Ranchoodas Krishnadas v. Rapu Narhar*, I L. R., 10 Bom., 489 and the Note to s. 13, *post*. In a suit brought against four defendants to prevent encroachments on a lane alleged by the plaintiff to be the common property of himself and the defendants, statements in support of the common ownership made by one defendant in a suit to which the others were not parties and in a deed put in by another defendant to prove his title to his house were admitted under this section;

See too *Gyannessa v. Moborakannessa*, I. L. R., 25 Cal., 210, *post*; *Naro Vinayak Patwardhan v. Narhari Bin Raghunath* and others; I. L. R., 16 Bom., 125.

The section is certainly not, in my opinion, intended to apply to such a rule of probability as that which infers that a man has committed one offence because there is reason to believe that he has committed another of a like nature. The extent to which character or previous indications of character by means of a conviction are relevant is defined in Section 54. In *R. v. Parbhudis Ambaram*, 11 Bom. H. C. Rep., 90, bundles of documents found in the houses of four of the accused, and alleged to be forgeries, or inchoate forgeries, were admitted in evidence to prove that the prisoners had forged the particular document with the forging of which they were charged. On appeal, the High Court of Bombay held that this evidence had been improperly admitted. West, J., observing (p. 91), that "Section 11 of the Evidence Act is, no doubt, expressed in terms so extensive that any fact which can, by a chain of ratiocination, be brought into connexion with another, so as to have a bearing upon a point in issue, may possibly be held to be relevant within its meaning. But the connexions of human affairs are so infinitely various and so far reaching, that, thus to take this section in its widest admissible sense, would be to complicate every trial with a mass of collateral inquiries limited only by the patience and the means of the parties That such an extensive meaning was not in the mind of the Legislature, seems to be shown by several indications in the Act itself. The Illustrations to Section 11 do not go beyond familiar cases in the English Law of Evidence... There must always be room for the exercise of discretion when the relevancy of testimony rests upon its effect towards making the affirmative or negative of a proposition 'highly probable;' and with any reasonable use of this discretion, the Court ought not to interfere, but it appears to me to be as illegal now, as before the Evidence Act was passed, to admit evidence of crime A in order to prove the cognate but unconnected crime B." See also *Griffits v. Payne*, 11 Ad. & E., 181.

The correctness of this view is demonstrated by the restrictions provided in Section 54 as to proof of previous bad character. It is not of another crime, but only of a previous conviction that evidence can be given in order to help to prove a man's guilt.

12. In suits in which damages are claimed, any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant.

In suits for damages, facts tending to enable Court to determine amount are relevant.

Note.

Facts affecting damages are relevant.—As to character as affecting damages, see Section 55.

In actions for defamation, other libellous expressions by the defendant, whether used before or after the commencement of the suit, are admissible to prove malice and so enhance damages. On the other hand, evidence of circumstances justifying the defendant's conduct, and showing that he acted *bona fide* and without malicious intention, would be relevant.

So, also, in mitigation of damages, the defendant may show facts tending to disprove malice, as *e.g.*, that rumours of the fact asserted were prevalent in the neighbourhood, *Richards v. Richards*, 2 M. & R., 557; or that the statement was copied from another paper; *Saunders v. Mills*, 6 Bing., 213.

As to how far enquiry may be made into the plaintiff's character in an action for libel or slander see note to Section 55, *post*.

Under this section, in actions for assault, the provocation offered by the plaintiff would be relevant: as would also in the case of actions against Railway Companies for injuries received, the position and circumstances and earnings of the plaintiff; and in suits for breach of contract, all facts showing the amount of loss occasioned to the plaintiff by the breach. See Contract Act, 1872, Section 78.

In an action for seduction the defendant cannot be asked "how rich are you?" This is not relevant. "The true measure of damages is the amount of compensation to be paid to the plaintiff for the injury he has sustained by the seduction of his daughter, and in an action of tort it should be immaterial, as Lord Mansfield said, whether the damages come out of a deep pocket or not." *Per Blackburn, J.*, in *Hodgson v. Taylor*, L. R., 9 Q. B., 79, at page 82.

In an action for breach of promise of marriage, on the other hand, the plaintiff may give evidence of the defendant's station in life and his means, to show the loss she has sustained. The defendant may prove that his relations disapproved of the match, *Irving v. Greenwood*, 1 C. & P., 350; or the conduct or character of the plaintiff, *Leeds v. Cook*, 4 Esp., 256, in reduction of damages. See Section 55.

Facts relevant when right of custom is in question.

13. Where the question is as to the existence of any right or custom, the following facts are relevant:—

(a) Any transaction by which the right or cus-

tom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence.

(b) Particular instances in which the right of custom was claimed, recognized, or exercised, or in which its exercise was disputed, asserted, or departed from.

Illustration.

The question is, whether A has a right to a fishery. A deed conferring the fishery on A's ancestors, a mortgage of the fishery by A's father, a subsequent grant of the fishery by A's father, irreconcilable with the mortgage, particular instances in which A's father exercised the right, or in which the exercise of the right was stopped by A's neighbours, are relevant facts.

Note.

Purport of the Section.—Some differences of opinion have been expressed in the Courts as to the purport of this section. In Sir James Stephen's Digest it is expanded into two articles, 5 and 6; the former of which deals with any "right of property," and the latter with customs. Article 5 provides that when the existence of any right of, or over property, "is in question, every fact which constitutes the title of the person claiming the right, or which shows that he, or any person through whom he claims, was in possession of the property, and every fact which constitutes an exercise of the right or which shows that its exercise was disputed, or which is inconsistent with its existence, or renders its existence improbable, is deemed to be relevant." And one of the Illustrations is

"(b) The question is, whether A owns land.

The fact that A's ancestor granted leases of it is deemed to be relevant. *Doe v. Pulman*, 3 Q. B., 622."

If the same meaning is to be given to the present section, it must be read as providing for proof of every transaction which goes to "constitute a man's title," i.e., every transaction, oral or written, by means of which the property has ultimately come into his hands, or which constituted an exercise of the right or a dispute of it, and every transaction, oral or written, the effect of which was to modify or destroy the right, or which is inconsistent with its continued existence, as for instance, transfers of it to other parties. If this be the meaning of the section it might well be contended that, under it, cases in which the parties, or those through whom they claim, have asserted the right in Court, ought to be regarded

as relevant. There is, however, a great reluctance in this country, where collusive judgments are such a familiar expedient, to admit as evidence any judgment to which the parties or their predecessors in title were not privies: and some Judges have considered that the juxtaposition of the words "*right or custom*" and the Illustration justify the view that the scope of the section is restricted to "incorporeal rights." In *Gujju Lal v. Fatteh Lal*, I. L. R., 6 Cal., 171, Garth, C. J., expressed this opinion. In that case the question arose whether a former judgment, not between the same parties or those through whom they claim, is admissible as a "*transaction*" under this section. The matter in issue was whether U or D was heir to H, and a former judgment in a suit between X and A, in which the point had been decided, was held by a majority of the Judges not to be admissible. In the *Collector of Gorakhpur v. Palakdhari Sing*, I. L. R., 12 All., 1, however, it was held that the record and not the judgments alone was admissible under this section, independently of Section 43, as evidence of a particular instance in which the alleged right of the plaintiff was at that time claimed and disputed—the word "*right*" in both clauses (a) and (b) including a right of ownership and not being confined to incorporeal rights. The fact that Section 42 specially provides for the admission of judgments, not *inter partes*, "when they relate to matters of a public nature, relevant to the inquiry," favours the view that it was not the intention under this section to include suits and judgments among the "*transactions*" with which the section deals: and that what is meant is, rather, such transactions as actually create, modify, or extinguish the right in question, or in which its actual enjoyment either took place or was opposed.

The Courts have frequently considered the proper application of this section in reference to previous judgments. In *Nayamat Ali v. Guru Das*, 22 W. R., 365, Couch, C. J., held that previous judgments not *inter partes*, were admissible for the purpose of proving the plaintiff's *itnami* tenure. In *Venkatavami Nayakkan v. Sankara Subbaiyan*, 2 Mad. H. C. Rep., 1, the question was as to the existence of a custom of periodical allotment of village lands, and a judgment not between the same parties, in which the custom was affirmed, was admitted as evidence of the existence and validity of the custom. See also *Naranji Bhikabai v. Dipa Umed*, I. L. R., 3 Bom., 3.

In *Rameshwar Pershad Narain Sing v. Koonj Behari Pattuk*, L. R., 6 I. A., 33, the dispute was between the owners of two estates, as to a right to a flow of water through a watercourse. The Judicial Committee admitted as evidence on the point a *razinama*, which was come to, after proceedings in the Criminal Court, by

the owners of one estate against the tenants of the other, who had closed the watercourse. The Judicial Committee observed, with reference to the objection that "this razinama did not bind the proprietors of the other estate, although it was apparently made between the tenants, it seems to have been subsequently acted upon, and may be properly used to explain the character of the enjoyment of the water." This case was followed in *Peari Mohun Mukerji v. Drobomoyi Dabia*, I. L. R., 11 Cal., 745, where a previous judgment not *inter partes* was admitted to show the nature of the possession of the defendant's predecessor in title. See too *Bai Baiji v. Bai Santok*, I. L. R., 20 Bom. 53. So also in a case, in which the plaintiff, who was an auction purchaser of a share in certain lands, sued for arrears of rent against the owners of another share in the same, it was admitted that certain plots of the estate were held in exclusive possession. The defendants claimed these plots as *lakhiraj*. The plaintiff put in evidence certain degrees in respect of such plots in which it was held against the persons in possession at the time that the lands were *mal*. It was held that, having regard to the circumstances and the particular defence set up, the degrees were admissible in evidence, not as showing that the lands were *mal* or *lakhiraj* but as showing that rent had been successfully claimed in respect of the lands; *Hira Lal Pal v. A. Hills*, 11 C. L. R., 528.

In *Jianutullah Sirdar v. Romoni Kant Roy and Pir Buksh Munda* v. the same, I. L. R., 15 Cal., 233, which was a suit for rent where the amount of land was questioned, it was contended that the customary *hath* in the *pergunnah* was one of 18 inches and not one of 21½ inches; and in support of this contention certain decrees obtained by the Zemindar against other tenants in the same *pergunnah* in suits in which 18 inches had been taken as the *hath* were tendered in evidence. It was held that such decrees were admissible under this section as they furnished evidence of *particular instances* in which the custom has been claimed. See also *Ramasami v. Appavu*, I. L. R., 12 Mad., 9.

The decision in *Gujju Lall v. Fatteh Lall*, *supra*, was followed, in *Ram Narain Rai v. Ram Coomar Chunder Poddur*, I. L. R., 11 Cal., 562, where it was held that where a defendant was not a party to a former suit, and did not claim through the parties against whom decrees in that suit were passed, having previously acquired the tenure in question by foreclosure, the decrees were not admissible as evidence against him. Similarly in *Mahendra Lal Khan v. Rosomoyi Dasi*, I. L. R., 12 Cal., 207, a decree passed against the defendant in a former suit was held inadmissible because the plaintiff did not claim through the plaintiff in that suit. See too

Surender Nath Pal Chowdhry v. Brojo Nath Pal Chowdhry, I. L. R., 13 Cal., 352. Evidence of a judgment in a former suit was held inadmissible to prove the *bona fides* of an entry in the books of a firm by a partner in the case of *Ranchhodas Krishnadas v. Bapu Narhar*, I. L. R., 10 Bom. 439; where Sargent, C. J., laid down that "rights and customs" in this section must include a right of ownership, but that "transaction" was not applicable to proceedings in a suit.

A decree under section 9 of the Specific Relief Act is evidence of the possession and the right of possession of the plaintiff, as against the defendants; and it is some, but not conclusive evidence of his dispossession by them, in a suit brought against the same persons for *mesne profits*. *Juanallah Sheikh v. Ime Khan*; I. L. R., 23 Cal., 698.

In *Itamasami v. Apparu*, I. L. R., 12 Mad. 9, the decision in *Gujju Lall v. Fattah Lall* was expressly concurred with, but the former case was distinguished from the latter on the ground that where owners of land were sued for payments alleged to be due in respect of a temple, a previous judgment in a similar case might be evidence of a particular instance "in which the right or custom was claimed," and "in which its exercise was disputed, asserted or departed from."

The decision in *Gujju Lall v. Fattah Lall*, *supra*, and *Surender Nath Pal Chowdhry v. Brojo Nath Pal Chowdhry*, I. L. R., 13 Cal., 352, must now however be taken subject to the judgments of the Privy Council in *Ram Ranjan Chakerbati v. Ram Narain Singh*, I. L. R., 22 Cal., 533; and *Bitto Kunwar v. Kesho Pershad*, L. R., 24 I. A. 10; see *Tepu Khan v. Rajani Mohun Das*, I. L. R., 25 Cal., 522.

In England it appears that where ancient rights, as *e.g.*, to a fishery, are in question, transactions, including not only acts of ownership, but legal proceedings such as an *inquisitio post mortem*, and Bills and Answers in Chancery, not between the same parties, have been admitted as part of the history of the right; *Rogers v. Allan*, 1 Camp., p. 309; and see *Neill v. Devonshire*, L. R., 8 App. Ca. 185. Such cases as these, when the right is of a public nature, are provided for by Section 42 of the present Act.

Connection between right or custom exercised and that to be proved.—

There will often be a question as to whether the right or custom, shown to have been exercised on some particular occasion is identical with the right or custom which has to be proved. The customs of one manor are not, in England, admissible to prove the customs of another; *Marquis of Anglesey v. Lord Hatherton*, 1 M. & W., 218; unless some connection can be shown between them, as, for instance,

that the manors were originally held under one tenure. So, also, where evidence of a right *exercised in a particular locality*, is given, it need not be confined to the precise spot, as to which the enquiry is, so long as there is such a common character between the places, as to suggest a reasonable inference that the same state of things existed in each. In *Jones v. Williams*, 2 M. & W., 326, the question was as to a right of ownership, as shown by certain acts of enjoyment, and Baron Parke, in deciding that evidence of such acts should be admitted said, "I am also of opinion that this case ought to go down to a new trial, because I think the evidence offered of acts in another part of one continuous hedge, and in the whole bed of the river, adjoining the plaintiff's land, was admissible in evidence, on the ground that they are such acts as might reasonably, lead to the inference that the entire hedge and bed of the river, and consequently the part in dispute, belonged to the plaintiff. Ownership may be proved by proof of possession, and that can be shown only by acts of enjoyment of the land itself; but it is impossible, in the nature of things, to confine the evidence to the very precise spot on which the alleged trespass may have been committed; *evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question, as would raise a reasonable inference in the minds of the jury, that the place in dispute belonged to the plaintiff if the other parts did.* In ordinary cases, to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the same enclosure; for the ownership of one part causes a reasonable inference that the other belongs to the same person; though it by no means follows as a necessary consequence; for different persons may have balks of land in the same inclosure; but this is a fact to be submitted to the jury. So, I apprehend, the same rule is applicable to a wood which is not inclosed by any fence: if you prove the cutting of timber in one part, I take that to be evidence to go to a jury to prove a right in the whole wood, although there be no fence, or distinct boundary, surrounding the whole; and the case of *Stanley v. White*, 14 East., 332, I conceive, is to be explained on this principle: there was a continuous belt of trees, and acts of ownership on one part were held to be admissible to prove that the plaintiff was the owner of another part, on which the trespass was committed. So, I should apply the same reasoning to a continuous hedge; though, no doubt, the defendant might rebut the inference that the whole belonged to the same person, by showing acts of ownership on his part along the same fence. It has been said, in the course of the argument, that the *defendant had no interest to dispute the acts of ownership not opposite to his own land: but the ground on which such acts are admissible is*

not the acquiescence of any party: they are admissible of themselves, proprio vigore, for they tend to prove that he who does them is the owner of the soil; though if they are done in the absence of all persons interested to dispute them, they are of less weight. That observation applies only to the effect of the evidence. Applying that reasoning to the present case, surely the plaintiff, who claims the whole bed of the river, is entitled to show the taking of stones, not only on the spot in question, but all along the bed of the river, which he claims as being his property; and he has a right to have that submitted to the jury. The same observation applies to the fence and the banks of the river. What weight the jury may attach to it is another question. The principle is the same as that laid down in *Doe v. Kemp*, 2 Bing. N. C. 102; 2 Scott, 9."

Customs recognized in Hindu Law.—Usage it has been repeatedly affirmed by the Judicial Committee of the Privy Council, will control the written text of the sacred canon of Hindu Law. "The remoter sources of the Hindu Law are common to all the different Schools. The process by which those Schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent Commentaries. The commentator put his own gloss on the ancient text, and his authority having been received in one and rejected in another part of India, Schools with conflicting doctrines arose.....The duty therefore, of a European Judge, who is under the obligation to administer Hindu law, is not so such to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular School which governs the District with which he has to deal, and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law;" *Collector of Madura v. Mootoo Ramalinga Sathupathy*, 12 Moo. I. A., 397, pp. 435, 436. "A custom is a rule which in a particular family or in a particular District, has from long usage obtained the force of law. It must be ancient, certain, and reasonable, and being in derogation of the general rules of law, must be construed strictly;" *Hurpurshad v. Sheo Dyal*, L. R., 3 I. A., 259, p. 285. So, again, in a case where the question was as to the legal course of descent of a *Raj*, it was said, "where a custom is proved to exist it supersedes the general law, which, however, still regulates all beyond the custom," *Nelkisto Deb Burmono v. Beerchunder Thakoor and others*, 12 M. I. A., 523; where, therefore, the custom is silent, recourse must be had to the general principles of Hindu law. In *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar*, 14 Moo. I. A., 570, where the right of succession to an impartible Zemindaree was in

question, the effect of custom was thus defined (p. 585): "Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular Districts and families of India; but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable: and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Court can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends." In this case it was proposed to give as evidence of a custom a letter of the Collector to the Board of Revenue, written under the following circumstances (p. 587): "In the year 1849, the Board of Revenue, acting as the Court of Wards, desiring to know which of the two minor sons of the Zemindar of Parayur was to succeed him, requested the Collector of Tinnevely and Madura to ascertain the rule of succession, 'as regards sons by different wives;' and it appears from the Collector's letter to the Secretary of the Board that the opinions of twenty Zemindars and Polygars were collected, copies of which he sent, giving also at the same time, an abstract of them in his letter. It seems that the Court of Wards acted upon the opinions thus obtained." Objections were taken to the admission of this letter and the accompanying abstract, and the Privy Council agreed with the High Court in considering the evidence inadmissible, on the ground that "the best evidence of which the subject is capable ought to be produced, or its absence reasonably accounted for, or explained, before secondary or inferior evidence is received. There seems no reason in this case why the Zemindars or some of them might not have been called as witnesses, when, of course, they would have been subject to cross-examination; but not only were none examined, but even their written opinions, as they gave them, were not produced." (*Ibid.*, page 585.) Under the present section the proceeding of the Board in acting on the opinions collected, might, perhaps, be regarded as a "transaction" or "a particular instance" in which the right in question was recognized, and so be admissible. The statements of the Zemindars and Polygars would have been admissible under Section 82 (4) if their non-production as witnesses had been duly accounted for under the first clause of that section. If any of them had been called, their statements to the Collector would have been admissible either to corroborate (Section 157) or to contradict (Section 145) their evidence. The Collector's letter and the abstract which accompanied it would still be inadmissible. A custom conferring a right to fish in certain bhils on all the inhabitants of a Zemindari, is bad as being unreasonable

because the inhabitants of the Zemindari are capable of increasing indefinitely; *Lutchmiput Singh v. Sadaulla Nushyo*, I. L. R., 9 Cal., 698. Where a certificate, manifest, and account sales, were sufficient evidence of an average loss and its amount, a custom that the certificate alone was sufficient was held bad as unreasonable; *Ramsordas Bhogilal v. Kesrising Mohanlal*, 1 Bom. H. C., Rep. 229. See too *Arlapa Nayak v. Narsi Keshavji and Co.*, 8 Bom. H. C., Rep. 19, and *De Souza v. Pestanji, Dhanjibhai*, I. L. R., 8 Bom., 408. The Court will not enforce a custom in favour of prostitution; *Chinna Ummai v. Tegarai Chetti*, I. L. R., 1 Mad. 168.

Judicial recognition of family custom.—For cases in which evidence of family custom was examined by the Indian Courts and the Judicial Committee, see *Rany Pudmarati v. Baboo Doolar Sing and others*, 4 M. I. A., 259, where the evidence was held sufficient to establish that a family was governed by the Mythila and not by the Bengal law; and *Rany Srimuty Dibeah v. Rany Koond Luta and others*, Ib., 292, in which the question was whether there was evidence to show that the family was governed by the Mitacschara, and not by the Dhvabhaga school of law, and the Judicial Committee decided that the evidence was insufficient. In *Soorendronath Roy v. Mussumut Heermonce Burmoneah*, 12 M. I. A., 81, the question was as to a special rule of descent, customary in a family which had migrated from one part of India to another and carried their own special custom of descent with them. Such a custom, their Lordships observed, (page 91) “must have had a legal origin, and have continuance (see *Abraham v. Abraham*, 9 M. I. A., 242 and 243); and whether the property be ancestral or self-acquired, the custom is capable of attaching and of being destroyed, equally as to both.” It was further held that where a family migrating into Bengal from the N.-W. Provinces, came attended by their own priests and retaining their customs, usages and religious observances, the continuance of this state of things was to be presumed, and the burthen of proof lay upon the person asserting its cessation. The acts of a single family will not constitute a custom at variance with the general law; *Tara Chand v. Reeb Ram*, 3 Mad. H. C. 50 and *Madhavav Raghavendra v. Balkrishna Raghavendra*, 4 Bom. H. C., Rep. A. C. 118. A manner of descent depending on family usage may be discontinued so as to let in the ordinary law of succession; *Rajkishen Singh v. Ranjoy Surma Mozoomdar*, I. L. R., 1 Cal., at p. 195.

In a suit to establish the existence of a family custom, the plaintiffs offered in evidence a deed containing a recital that the custom of the family was as alleged in a plaint, and a covenant not to do anything contrary to it. The deed was executed before action brought by the plaintiffs, and also by a plaintiff who had died since the institution of

the suit, and, as the plaint alleged, by "a considerable majority" of the family, but the defendant was not a party to it. Macpherson, J., reading Sections 13 and 32. Cl. 7 together, admitted the recitals "as being a statement in writing made by one of the plaintiffs, Shama Churn Mullick, who might have been examined as a witness had he not died since the suit was instituted." Having held that the recitals were relevant under Section 32, the learned Judge felt bound to admit and admitted the deed on behalf of the plaintiffs generally, but held that it was worthless, as against a third party, as evidence of the alleged custom, which must be proved *aliunde*: *Hurronath Mullick v. Nittanund Mullick*, 10 B. L. R., 263.

As to the evidence of usage necessary to import a right to interest under a contract, where it is not expressly reserved, see *Juggomohun Ghose v. Manickchand*, 7 M. I. A., 263, and *Juggomohun Ghose v. Kaisreechund*, 9 M. I. A., 256. At the first hearing of this appeal, Sir J. Coleridge observed, as to the evidence necessary to establish mercantile usage, "to support such a ground, there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes a local law. The usage may still be in course of growth; it may require evidence for its support in each case; but, in the result, it is enough if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract." 7 M. I. A., 282.

Criteria of a customary Law.—"The acts of individuals are not the foundation of law but the signs of the existence of a common idea of law. The acts required for the establishment of customary law, ought to be plural, uniform, and constant. They may be judicial decisions, but these are not indispensable for its establishment, although some have thought otherwise. The authors of the acts must have performed them with the consciousness that they spring from a legal necessity." *Tira Chand v. Reeb Ram*, Madras H. C. Rep., p. 50, at page 57.

"The most cogent evidence of custom is not that which is afforded by the expression of opinion as to the existence but by the enumeration of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private accounts and receipts that the custom has been enforced;" *Lachman Rai v. Akbar Khan*, I. L. R., 1 All. 440. To be binding it must be of remote antiquity, it must have been continued and acquiesced in, it must be reasonable and certain; *Lala v. Hira Singh*, I. L. R., 2 All. 49; see too *Beni Madhab Banerjee v. Jai Krishna Mookerjee*, 7 B. L. R., 152. When a book is used to prove a local custom the attention

of the parties should be called to it, and they should be heard on it; *Vallabha v. Madusudanani*, I. L. R., 12 Mad 495. In a pre-emption suit evidence of a decree in a previous suit has been admitted to prove a custom; *Gurdayal Mal v. Jhandu Mal*, I. L. R., 10 All. 585; see too *Madhub Chunder Nath Biswas v. Tomee Bewah*, 7 W. R. 210. A *wajib-ul-arzis* strong but not conclusive evidence of a local custom; *Umam Parshad v. Gandharp Singh*, L. R., 14 I. A. 127; I. L. R., 15 Cal. 20; see too *Isri Sing v. Ganga*, I. L. R., 2 All. 816, and *Muhammad Hasan v. Munna Lal*, I. L. R., 8 All. 484. On the subject of family customs, see *Chintaman Singh v. Nowlukho Konwari*, 1 I. L. R., Cal. p. 153; *Rajkishen Singh v. Ramjoy Surma Mozoomdar*, *Ibid.*, 186. In *Gopalayyan Raghupatiayyan*, 7 M. H. C., 250, the Judges point out the direction which an enquiry as to customary law should take: *viz.*

1. "The evidence should be such as to prove the uniformity and continuity of the usage and *the conviction of those following it that they were acting in accordance with law*, and this conviction must be inferred from the evidence."

2. "Evidence of acts of the kind, acquiescence in those acts, their publicity, decisions of Courts, or even of panchayats upholding such acts, the statements of experienced and competent persons of their belief that such acts were legal and valid will all be admissible; but it is obvious that, although admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted."

Legislative recognitions of custom.—Besides the general rule giving effect to custom in British India, there are numerous legislative recognitions of its binding force. See Punjab Laws' Act IV of 1872: the Burma Courts' Act of 1889: the Indian Contract Act, 1872, Sections 1, 110, as to usage or customs of trade: the Madras Civil Courts' Act, 1873, Section 16 (*b*): the N.-W. P. Rent Act, XII of 1881: N. W. P. Land Revenue Act, 1873, (Act XIX of 1873), Sections 3, 25, 26, 28, 41, 47, 67 and 119.

Period during which the custom has prevailed.—As to the period of time during which a custom must be shown in India to have prevailed in order to be binding, no rule has been laid down by the Courts, nor perhaps is it possible to lay down any. The great system of customary law which governs the community of Sikhs in the Panjab, for instance, is the growth of, comparatively, very recent times. The English rule which dates the period of legal memory as far back as the reign of Richard I., is, of course, wholly inapplicable. It was observed by Grey, C. J., that in Calcutta, in order to establish a valid custom, it should be traced back to the year 1773, when the Supreme Court

was established: and in the Mofussil to the year 1793, previous to which there was no registry of Regulations. An usage for 20 years, however, he admitted, might raise a presumption, in the absence of direct evidence, of a usage existing beyond legal memory; *Jugmohun Rai v. Sremati Nimu Dasi*, Montriau, 596. In like manner it may be questioned whether, in societies which have undergone so many shocks and vicissitudes as those which compose the British Indian Empire, the same rigid rule of continuity can be enforced as the English law exacts as to English customs. As to what is "reasonable" in a custom, care must be taken to judge of reasonableness from the point of view of those among whom the custom is alleged to exist and to the regulation of whose affairs it is to be applied.

14. Facts showing the existence of any state of mind—such as intention, knowledge⁽¹⁾ good faith,^e negligence, rashness, ill-will or good-will towards^o any particular person, or showing the existence of any state of body or bodily feeling—are relevant, when the existence of any such state of mind or body or bodily feeling, is in issue or relevant.

Explanation 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists, not generally, but in reference to the particular matter in question.

Explanation 2.—But where, upon the trial of a person accused of an offence, the previous commission by the accused of an offence is relevant within the meaning of this section, the previous conviction of such person shall be a relevant fact.—[*Act III*, 1891, s. 1, (1).]

Illustrations.

(a) A is accused of receiving stolen goods knowing them to be stolen. It is proved that he was in possession of a particular stolen article.

The fact that at the same time he was in possession of many other stolen articles is relevant, as tending to show that he knew

each and all of the articles of which he was in possession to be stolen.

(b) A is accused of fraudulently delivering to another person a counterfeit coin which at the time when he delivered it he knew to be counterfeit.

The fact that at the time of its delivery, A was possessed of a number of other pieces of counterfeit coin is relevant.

The fact that A had been previously convicted of delivering to another person as genuine a counterfeit coin knowing it to be counterfeit, is relevant.—[*Ict III*, 1891, s. 1, (2).]

(c) A sues B for damage done by a dog of B's which B knew to be ferocious.

The facts that the dog had previously bitten X, Y and Z, and that they had made complaints to B, are relevant.

(d) The question is whether A, the acceptor of a bill of exchange, knew that the name of the payee was fictitious.

The fact that A had accepted other bills drawn in the same manner before they could have been transmitted to him by the payee if the payee had been a real person, is relevant, as showing that A knew that the payee was a fictitious person.

(e) A is accused of defaming B by publishing an imputation intended to harm the reputation of B.

The fact of previous publications by A respecting B, showing ill-will on the part of A towards B, is relevant, as proving A's intention to harm B's reputation by the particular publication in question.

The facts that there was no previous quarrel between A and B, and that A repeated the matter complained of as he heard it, are relevant, as showing that A did not intend to harm the reputation of B.

(f) A is sued by B for fraudulently representing to B that C was solvent, whereby B, being induced to trust C, who was insolvent, suffered loss.

The fact that, at the time when A represented C to be solvent, C was supposed to be solvent by his neighbours and by persons dealing with him, is relevant, as showing that A made the representation in good faith.

(g) A is sued by B for the price of work done by B, upon a house of which A is owner, by the order of C, a contractor.

A's defence is that B's contract was with C.

The fact that A paid C for the work in question is relevant, as proving that A did, in good faith, make over to C the management of the work in question, so that C was in a position to contract with B on C's own account, and not as agent for A.

(h) A is accused of the dishonest misappropriation of property which he had found, and the question is whether, when he appropriated it, he believed in good faith that the real owner could not be found.

The fact that public notice of the loss of the property had been given in the place where A was, is relevant, as showing that A did not in good faith believe that the real owner of the property could not be found.

The fact that A knew, or had reason to believe, that the notice was given fraudulently by C, who had heard of the loss of the property and wished to set up a false claim to it, is relevant, as showing that the fact that A knew of the notice did not disprove A's good faith.

(i) A is charged with shooting at B with intent to kill him. In order to show A's intent, the fact of A's having previously shot at B may be proved.

(j) A is charged with sending threatening letters to B. Threatening letters previously sent by A to B may be proved, as showing the intention of the letters.

(k) The question is, whether A has been guilty of cruelty towards B, his wife.

Expressions of their feeling towards each other shortly before or after the alleged cruelty, are relevant facts.

(l) The question is, whether A's death was caused by poison. Statements made by A during his illness as to his symptoms, are relevant facts.

(m) The question is, what was the state of A's health at the time when an assurance on his life was effected.

Statements made by A as to the state of his health at or near the time in question, are relevant facts.

(*n*) A sues B for negligence in providing him with a carriage for hire not reasonably fit for use, whereby A was injured.

The fact that B's attention was drawn on other occasions to the defect of that particular carriage, is relevant.

The fact that B was habitually negligent about the carriages which he let to hire, is irrelevant.

(*o*) A is tried for the murder of B by intentionally shooting him dead.

The fact that A, on other occasions, shot at B is relevant, as showing his intention to shoot B.

The fact that A was in the habit of shooting at people with intent to murder them, is irrelevant.

(*p*) A is tried for a crime.

The fact that he said something indicating an intention to commit that particular crime, is relevant.

The fact that he said something indicating a general disposition to commit crimes of that class, is irrelevant.

Note.

(1) **Facts showing state of mind, body or bodily feeling.**—We now come to evidence as to states of mind or body, with which this and the following section expressly deal, the present section providing generally for the subject, and section fifteen providing for the special mode of proving a thing to have been intentional by showing that it formed one of a series of similar occurrences.

States of mind, knowledge, intention, and the like, are among the most important topics with which judicial enquires are concerned. In criminal cases they are invariably a main consideration; and in civil cases they are often highly material, as, for instance, where there is a question of fraud, malicious intention, or negligence.

The simplest and most direct mode of proving a state of mind would be, of course, the evidence of the person himself stating in Court what his mental feelings, at a particular time, were. This evidence is, however, for obvious reasons, in many cases untrustworthy, and in other cases is not to be had. The state of mind must then be inferred from its outward manifestations; these may be either words or deeds. The English law has in several instances given express legislative sanction to particular inferences as to a guilty intention. Thus by 34 & 35 Vic. c. 112, Section 19, it is provided that when a person is charged with having knowingly received or having in his possession stolen property, the fact that

other stolen property was found in his possession within the preceding 12 months shall be relevant to the question of whether he knew the property to be stolen: as also is the fact that he has within the 5 years immediately preceding been convicted of any offence involving fraud or dishonesty. The law under the present Act is more general. There is no limitation as to the period within which the other stolen property must have been found in the person's possession; and the previous conviction, irrespective of date, would in every case be relevant under Section 54 of this Act, though the present Code of Criminal Procedure forbids it to be proved as part of the evidence. The question in each case must be whether the fact, proposed to be proved, really throws light on the person's state of mind; if it does, the present section appears to render it admissible but not otherwise. Thus, where a person was charged with forgery of a Promissory Note and four others with abetting him, the fact that 150 other papers, alleged to be forgeries or inchoate forgeries were found in the houses of four of the accused, was held by the Bombay High Court to be irrelevant; *R. v. Parbhudas Ambaram and others*, 11 Bom., 90. In *The Empress v. Vyapoory Woodeliam*, I. L. R., 6 Cal. 655; 8 C. L. R., 197, the accused was charged with having received illegal gratification from C in 1876; it was held that proof of similar but unconnected acts of receiving from the same person in 1877 and 1878 was inadmissible, and Garth, J., restricted the operation of this section to cases where a particular act is more or less criminal or culpable according to the state of mind of the person who does it. Consistently with this where the charge was fraudulently transferring property to three persons in order to prevent it being taken in execution, it was held that evidence of five other similar transfers by the accused on the same day was admissible; *Queen-Empress v. Vijiram*, I. L. R., 16 Bom., 414. The first four Illustrations give instances of the mode in which knowledge may be proved: Illustrations (e) to (j) deal with various intentions, malice, fraud, murder, &c.; (k) shows how persons' expressions of feeling towards each other at or about any particular time may be used to show what those feelings were: and (l) and (m) show the same thing in regard to states of body. It will be observed that this section gets rid of all technicalities as to the class of cases in which evidence is admissible, or the time within which the fact, given as evidence of mental or bodily condition, must have occurred. The only point for the Court to consider, in deciding on the admissibility of evidence under its provisions, is whether the fact can be said to *show the existence* of the state of mind or body under investigation.

The acts of one person may sometimes serve to indicate another person's state of mind. Thus, in a suit, where the question was

whether the defendant knew at the time of a contract, made with the plaintiff, that the plaintiff was insane, evidence of the plaintiff's conduct on various occasions before and after the contract was held admissible for the purpose of showing that the plaintiff's malady was of such a nature as would make itself apparent to the defendant at the time of the contract; *Beavan v. M'Donnell*, 28 L. J., (N. S.) Ex., 94. Such evidence would be relevant under the present section for the purpose of showing that the defendant was not acting in good faith.

(2) **The state of mind proved must be particular not general.**—Illustrations (n) (o) and (p) have reference to this. The meaning is that the state of mind to be proved must be, not merely a general tendency or disposition towards conduct of a similar description to that in question, but a condition of thought and feeling having distinct and immediate reference to the matter which is under enquiry. The fact that a man is generally dishonest, generally malicious, generally negligent or criminal in his proceedings does not bear with sufficient directness on his conduct on any particular occasion, or as to any particular matter, to make it safe to take it as a guide in interpreting his conduct: what is wanted is a fact which will throw light on his motives and state of mind *with immediate reference to that particular occasion or matter*. Illustrations (a) and (b) make this clear. A man is accused of receiving stolen goods with guilty knowledge: if he is merely shown to be generally dishonest, the probability of his having been dishonest in this particular transaction is perhaps increased, but only in a vague and indefinite way: but if, at the time, he is found in possession of a number of other stolen articles, this fact throws a distinct light on his knowledge and intentions as to the articles of which he is found in possession. It would be dangerous to infer that because a man was generally dishonest, he was dishonest in any single case: but it is not dangerous to infer that a man, who is found in possession of 50 articles, which are shown to have been stolen from different people, came by each and all in a dishonest manner.

Thus, where the prisoner was charged with endeavouring to obtain an advance upon a ring from a pawnbroker, falsely representing that it was a diamond ring, in order to prove the fact of guilty knowledge, evidence was admitted to show that two days previous to the transaction in question, the prisoner had obtained an advance from a pawnbroker upon a chain which he falsely represented to be a gold chain, and that he tried to obtain from other pawnbrokers advances upon a ring which he falsely represented to be a diamond ring; *R. v. Francis*, L. R., 2 C. C. R., 128.

15. When there is a question whether an act was accidental or intentional, or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.—[*Act III*, 1891, s. 2.]

Facts bearing on question whether act was accidental or intentional.

Illustrations.

(a) A is accused of burning down his house in order to obtain money for which it is insured.

The facts that A lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires A received payment from a different insurance office, are relevant, as tending to show that the fires were not accidental.

(b) A is employed to receive money from the debtors of B. It is A's duty to make entries in a book showing the amounts received by him. He makes an entry showing that on a particular occasion he received less than he really did receive.

The question is, whether this false entry was accidental or intentional.

The facts that other entries made by A in the same book are false, and that the false entry is in each case in favor of A, are relevant.

(c) A is accused of fraudulently delivering to B a counterfeit rupee.

The question is, whether the delivery of the rupee was accidental.

The facts that soon before or soon after the delivery to B, A delivered counterfeit rupees to C, D, and E, are relevant, as showing that the delivery to A was not accidental.

Note.

Facts bearing on question whether an act was accidental or intentional.—This section is merely an application of the rule laid down in the preceding one. The facts admitted are facts tending to show intention. The present rule is somewhat more general than the

English law on the subject. 34 & 35 Vic. c. 112, Section 19 (see Note 1 to Section 14) has provided for the case of stolen property and the rule has long been recognized in cases of counterfeiting, forgery, and uttering of counterfeit coin. The English rule is, however, subject to the restriction that, though on an indictment for uttering a forged note, other utterings of forged notes may be proved, evidence cannot be given as to what the prisoner said or did at the time with respect to such other utterings; "for these are collateral facts too remote for any reasonable presumption of guilt to be founded upon them, and such as the prisoner cannot by any possibility be prepared to contradict."—*Tayl.*, § 345. Under the present Act, as the other utterings are relevant facts, statements accompanying and explaining such facts would be relevant under Section 8, or Section 9.

Evidence of a fact forming one of a series has been admitted in England in cases in which it goes to disprove accident, even where it forms the subject of a separate indictment.

Thus, where four indictments were preferred against a woman on a charge of having poisoned her husband and two of her sons, and of having attempted to poison a third, on the trial of the first of the indictments only, evidence that arsenic had been taken by the three sons shortly after their father's death, that all parties, when ill, exhibited the same symptoms, and that the woman lived in the house and prepared the meals, was admitted, though the indictment dealt with the husband's death only, for the purpose of showing that his death was caused by taking arsenic and was not accidental; *R. v. Geering*, 18 L. J., (N. S.) M. C., 215, and see *R. v. Garner*, 8 F. and F., 681.

Existence of
course of busi-
ness when
relevant.

16. When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.⁽¹⁾

Illustrations.

(a) The question is, whether a particular letter was despatched.

The facts that it was ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place, are relevant.⁽²⁾

(b) The question is whether a particular letter reached A. The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant.

Note.

(1) **Existence of course of business.**—This section proceeds upon the well-recognised fact that the conduct of human beings is generally,—and in official and commercial matters, to a very great extent indeed,—uniform. The books of a well ordered firm, for instance, are kept from year to year in so unvarying a manner, that there is the strongest presumption that the regularity will not in any particular instance, be departed from. Some great departments, such as the Post Office, work with such mechanical exactness that uniformity may be regarded as next door to certain. The existence of such a course of business should be clearly made out. An attempt is often made to give evidence of facts which form no part of the transaction in question and have no real connection with it, on the ground that they give rise to an inference that what happened in the one case would probably happen in the other. Such evidence would not be admissible. Thus, in a suit between a landlord and tenant, when the issue was whether the rent was payable quarterly or half-yearly, evidence of the mode in which other tenants paid their rent would be inadmissible, unless a regular course of business, according to which all tenants invariably paid their rent, could be shown: *Carter v. Pryke*, 1, Peake, 130, 3rd edn. So, when the point in issue was whether the beer supplied by a brewer was good, evidence as to the goodness or badness of beer supplied by the same brewer to other customers would be inadmissible, because it does not necessarily follow that all customers got the same quality of beer; but the case, it is apprehended, would be different, if it were shown that beer of the same brewing had been supplied, under the same circumstances, to other customers, so as to establish a connection between the two deliveries; *Holcombe v. Hewson*, 2 Camp., 391.

In the same way, when the question was as to the terms of a contract for certain guano, evidence was offered as to the terms of other contracts for guano made by the same defendant, and was rejected on the ground that there was no reason, because a man had done a thing once, that he should do it again, and that no connection between the two contracts had been made out. But the case would obviously be different if it could be shown that according to a regular course of trade all guano contracts were invariably in certain terms; *Hollington v. Head*, 4 U. B., (N. S.) 388.

. So, where A was sued on a bill of exchange accepted in his name by B, in order to prove that B had general authority to accept bills in the name of A, evidence was admitted of A's having acknowledged his liability on another bill accepted in his name by B; *Gibson v. Hunter*, 2 H. Bl., 288.

(2) **Proof of despatch of letter.**—This Illustration seems to supply the place of Sections 50 and 51 of Act II of 1855, which provided (1) that when a letter book, duly kept, is produced, and it is proved that a letter copied into it was despatched in the ordinary course, the Court may presume its despatch and (2) that when a book is kept for marking despatch and receipt of letters and a letter is entered as received, the entry shall be *prima facie* evidence of its receipt.

These facts would, under Section 114, justify the Court in presuming despatch or receipt.

ADMISSIONS.

Admissions
defined.

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

Note.

Admission.—An admission, under the above definition, is a statement as to certain things made by certain persons, and under certain circumstances, *whatever be the inference which it suggests*. Whether, therefore, the statement denies or admits a fact, it will be equally an admission, if it complies with the requirements of the following sections. It must be observed that, under the present Act, an admission has not the effect of precluding the person who made it from giving evidence to contradict it: an admission is evidence of the fact stated, and often of course very strong evidence: but it is not conclusive proof (see Section 31), and, unless the person making it is estopped under the provisions of Sections 115—117, he is at liberty to contradict it if he can. In the English Common Law Courts, and *a fortiori*, in the Courts of Law, in India, where the pleadings are less technical, an admission of a fact on the pleadings implication, is not an admission for any other purpose than that of the particular issue and is not tantamount to proof of a fact. An admission, or even a confession of judgment by one of several defendants in a suit, is no evidence against another defendant; *Aumirtolall Bose v. Rajoneekant Mitter*, L. R., 2 I. A., 118. A letter does not require a stamp merely because it contains an admission; *Situl Pershad v. Monohur Doss*, 23 W. R., 325; even though the admission relates to the granting of a lease; *Narain Coomary v. Ramkrishna Doss*, I. L. R., 5 Cal., 864.

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case, as expressly or impliedly authorized by him to make them, are admissions.⁽¹⁾

Admission—
by party to
proceeding or
his agent;

Statements made by parties to suits suing⁽²⁾ or sued in a representative character are not admissions, unless they were made while the party making them held that character.

by suitor in
representative
character;

Statements made by—

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested,⁽³⁾ or

by party interested
in sub-
ject-matter;

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,⁽⁴⁾

by person
from whom
interest de-
rived.

are admissions if they are made during the continuance of the interest of the persons making the statements.⁽⁵⁾

Note.

(1) **Admission by agent.**—As the rule admitting the declarations of the agent is founded upon his legal identity with the principal, they bind only so far as the agent had authority to make them.—*Tayl.*, § 605. Care must therefore be taken, as to statements by agents and servants, to see that they are of such a nature as to fall within the scope of the agent's employment, and are such as the agent is expressly or implicitly empowered by his principal to make. Thus, what is said by an agent respecting a contract or other matter in the course of his employment, is an admission, as against the principal, in a suit grounded on such contract or matter; but what is said by him on another occasion is not an admission; *Peto v. Hague*, 5 Esp., 134.

The following views as to admissions by an agent were propounded by Sir W. Grant, M. R. :—

“As a general proposition, what one man says, not upon oath, cannot be evidence against another man. The exception must arise

out of some peculiarity of situation, coupled with the declarations made by the man in question. An agent may undoubtedly, within the scope of his authority, bind his principal, by his agreement; and in many cases by his acts. What the agent has said may be what constitutes the agreement of the principal: or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove the agent did make the statement or representation. So with regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But except in one or other of these ways I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot amount to proof of it; though it may have some relation to the business in which the person making that assertion was employed as agent.....The admission of an agent cannot be assimilated to the admission of the principal. A party is bound by his own admission; and is not permitted to contradict it. But it is impossible to say a man is precluded from questioning or contradicting anything any person has asserted as to him, as to his conduct or his agreement, merely because that person has been an agent of his. If any fact, material to the interest of either party rests in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertion;" *Fairlie v. Hastings*, 10 Vesey Jun., 128.

Accordingly, when a horse-dealer or livery-stable-keeper employs a servant to sell a horse, any statement, made by him at the time of sale, even though it amount to a warranty of soundness, which the servant has been really ordered not to give, will, as it seems, bind the master; but the servant's declarations or acknowledgments at any other time, whether made to a stranger or to the purchaser, will not be received; *Helyear v. Hawke*, 5 Esp., 72; *Fenn v. Harrison*, 3 T. R., 759. The servant of a private owner, entrusted on one particular occasion, not at a fair or other public mart, to sell and deliver a horse, is not by law authorised to bind his master by a warranty; and the buyer who takes a warranty in such a case takes at the risk of being able to prove that the servant had his master's authority to give it; *Brady v. Tod*, 30 L. J., (N. S.) C. P., 228.

The test is whether the person making the statements was expressly or impliedly authorised by his employer to do so: thus, a statement by a Night Inspector at a Railway station, that he had forgotten to forward certain cattle, was excluded on the ground that it did not fall within the scope of his duties, and he could not be presumed to be authorised, to make admissions as to past transactions; *Great Western Railway Co. v. Willis*, 34 L. J., C. P., 195. An admission by a

servant of a negligent act is not evidence against his master; *Johnson v. Lindsay*, 53 J. P., 590.

In the *Kirkstall Brewery Co. v. The Furness Railway Co.*, L. R., 9 Q. B., 468, the plaintiffs sent by the defendants' railway a parcel of money addressed to their clerk at C, where there was a station on the defendants' railway. The parcel was not delivered to plaintiffs' clerk, and on the same day H, a porter in defendants' service at C station, disappeared. The station-master at C informed a Police Superintendent at U of this, the latter having gone to the former in consequence of a communication from him. The Superintendent gave the following evidence: "I know P, the station-master at defendants' railway station at U. In consequence of a communication, I went to him on Saturday the 30th of July. He told me that H, a parcel porter, had absconded from the service; that a money parcel was missing, and he, P, suspected H had taken it; would I (the witness) make enquiries after him." This evidence was objected to by the defendants. It was, however, admitted, and, a verdict having passed for plaintiffs, it was held that the evidence was rightly admitted: for that it must be taken that the station-master, being the person in charge there, had authority from the defendants to set the Police in motion, and that what he said, pertinent to the occasion, when acting within the scope of his authority, was evidence against the defendants.

With regard to Counsel, Attorneys, Pleaders, &c., they would doubtless be regarded by the Court as empowered to make admissions on behalf of their clients in all matters relating to the progress and trial of the cause.

With regard to facts admitted in Court by the parties or their agents, it will be seen at Section 58 that, when such admissions are made, the Judge may dispense with proof and regard the admitted fact as proved. A party might, accordingly, find himself precluded from subsequently contesting a fact so admitted. The principle has been thus laid down in the Privy Council. The admission and consent of a Vakil, made with due authority, will bind his client, though not present at the time of making it: "otherwise it would not be safe to see any agent or counsel, without letting the parties themselves appear, in the most trifling matter. The Court must, in all such cases, see the parties themselves, if they are not to be bound by their agents." Where, therefore, an order was made for the payment of a certain sum, being the moiety of the profits of an estate, founded on an amount calculated in a particular manner, which amount was admitted and assented to by the Vakil in Court, and the order made accordingly, it was held by the Judicial Committee, affirming the Judgment of the Court below, that such consent was

binding on the client, and precluded him from afterwards opening the account; *Rajunder Narain Rae v. Bajai Govind Sing*, 2 M. I. A., 253. *Kower Narain Roy v. Sreenath Mitter*, 9 W. R., 485. The greatest caution should be exercised by the Courts before acting upon statements out of the ordinary scope of the Vakil's authority in the particular matter in which he was employed; *Venkatapurimanna v. Chavela Atchiyamma*, 6 M. H. C. Rep., p. 127.

Admissions by wife.—The question as to whether a wife has authority to make a statement, so as to render it an admission as against her husband, must depend on the facts of the case, as with any other agency: it will “turn on the degree in which the husband permitted the wife to participate, either in the transaction of his affairs in general, or in the particular matter in question.”—*Tayl.*, § 770. It will not follow because she has authority to make admissions as to one matter, that she is empowered to make admissions as to another.

Thus, when a wife, by her husband's authority, carried on the business of a shop, and attended to all the receipts and payments, the Court held that admissions, made by her to the landlord of the shop respecting the amount of rent, were not admissible to bind the husband. Had the admissions related to the receipt of shop goods, they would have been evidence; but the fact that she was conducting a business for her husband, did not constitute her his agent to make admissions of an antecedent contract for the hire of the shop, or to make a new contract for the future occupation of it; *Meredith v. Footner*, 11 M. & W., 202.

Admission by an infant.—The declarations and acts of an agent cannot bind an infant, because an infant cannot appoint an agent; *Doe d. Thomas v. Roberts*, 16 M. & W., 778. But so far as the validity of the admission itself is concerned, it matters not whether the person who made it was, at the time of making of it, of full age. Accordingly, in an action against a person for goods supplied to him during minority, admissions by him while a minor may be used; *O'Neill v. Read*, 7 Ir. L. R., 434; *Tayl.*, §§ 803 & 740. It has been held, however, that an infant is not bound by admissions made, or facts stated, for the purposes of a suit; *Hawkins v. Luscombe*, 2 Swans., 375. As to the power of a guardian to make admissions binding on a minor, see *Suraj Mukhi Kunwar v. Bhagwati Kunwar*, 10 C. L. R., 377, and *Abdool Hye v. Banee Pershad*, 21 W. R., 228.

(2) **Admissions before vesting of representative character.**—There are conflicting decisions of the English Courts as to whether statements of a person, suing as representative of others, made before he became such, should be regarded as admissions. Under the present

Act they will be excluded, as not being made while he held his representative character

(3) **Admission by a party interested in' subject-matter.**—Under this provision the statements of joint tenants, co-sharers, partners, and such like become admissions; but with respect to other persons interested in the same property it must be remembered that an admission can be proved only against the person who makes it or his representative in interest. Thus one partner is properly the agent of another for the purpose of making an admission on partnership affairs; but the statement of a tenant in common cannot be used as an admission against another tenant in common or his representatives. Admissions by a *cestui-que-trust*, would, in the same way, be admissions as against his trustee suing in his capacity of trustee.

An admission by one co-defendant cannot bind another; *Aumirtolall Bose v. Rajoneekant Mitter*, L. R., 2 I. A., 113; *Lachman Singh v. Tansukh*, I. L. R., 6 All., 395; *Azizullah Khan v. Ahmad Ali Khan*, I. L. R., 6 All., 353. But an admission by one of several jotedars is evidence as against the other jotedars; *Kowsulliah Sundari Dasi v. Mukta Sundari Dasi*, I. L. R., 11 Cal., 588.

In England the admission of a partner in a firm, made after its dissolution, as to transactions during its continuance are admissible as against the other partners on the ground that, so far as those transactions are concerned, the partner's liability still survives; *Pritchard v. Draper*, 1 Russ. & Myl., 191. The relevancy of such an admission under the present section would depend on whether the person making it still had a pecuniary interest in the matter to which it referred. For the English law as to the power of a partner to bind his firm by admissions see Section 15 of the Partnership Act 1890, and Lindley, pp. 186—7

An admission of indebtedness by one of several joint-contractors, partners, executors or mortgagees, although in writing, does not operate for the purpose of preventing a debt being barred by limitation against any other of them. Act XV of 1877, Section 21.

(4) **Admissions by persons from whom interest is derived.**—Thus, statements of an ancestor would be admissions as against the heir, statements by a grantor or donor would be admissions against the grantee or donee; statements by a former holder of an office as against his successors in it; statements of a testator as against his executor; statements of an intestate as against his administrator. So, again, any declaration by a landlord, in a prior lease, which refers to the matter in issue, and concerns the estate, has been received in evidence against a lessee, who claims by a subsequent title. But the state-

ments of a tenant for life as to the reversionary estate are not admissions as against the remainder-man or reversioner, because the one does not derive his interest from the other, though he comes into possession of it subsequently to him.

The question whether the statement of a member of a joint Hindoo family, under Mitakshara law, ought to be allowed to be proved as against his sons, is not expressly provided for by the section, and is one of some difficulty. It is submitted that such statements ought not to be proved as admissions against the sons, when they affect the estate in the sons' hands, inasmuch as the sons are not the fathers' "representatives in interest," in the sense of being his heirs, but are in the position of joint-tenants with him with an interest by survivorship, contingent on his death. What he says, therefore, about the estate which comes into their hands cannot, it would appear, be regarded, as against them as an admission. The father's interest may be the very opposite of the sons'. A father, for instance, is often interested in proving the property to be self-acquired, the sons in proving it to be ancestral. It would be hard that the father's statements in such a case should be deemed to be the sons' admissions. In *Periavocho Thaven v. Kumarayi*, Madras Law Reporter, p. 22, Kernan, J., held that, in the case of ancestral property, an agreement by the father to get a suit in respect of it settled by oath does not bind his sons, as they do not claim under him but in their own rights. The same reason appears to hold good with regard to admissions made by the father. The Sadr Court of Madras held that the admissions of a Hindoo father are binding on his sons, 42 of 1857, Rep. of 1858, p. 89; 118 of 1860, Rep. of 1860, p. 287; and representatives, 66 of 1857, Rep. of 1858, p. 89; 9 of 1858; but that the admissions of a *Karnaven* of a Malabar family are not necessarily binding on the family, 79 of 1854, Rep. of 1855, p. 17. The distinction is not apparent.

An auction-purchaser of an Estate sold for arrears of Revenue does not, in the sense of this section, derive his title from the previous owner; *Kooldeep Narain Singh v. Government of India*, 11 B. L. R., 71: but a purchaser at an execution sale is the 'representative of the judgment-debtor as regards admissions; *Enayat Hossein v. Gridhari Lal*, 2 B. L. R., P. C., 78; *Poreshnath Mookerjee v. Anathnath Deh*, L. R., 9 I. A., 147.

(5) **Time and circumstances of the admission.**—"With respect to the time and circumstances of the admission," says Mr. Taylor, "it may first be observed, that, whenever the declarations of a third person are offered in evidence, on the ground that the party, against whom they are tendered, derives his title from the declarant, it must

be shown that they were made at a time when he had an interest in the property in question. For it would be manifestly unjust. that a person, after having parted with his interest in property. should be empowered to divest the right of another claiming under him, by any statement which he may choose to make. Accordingly. the admission of a former party to a bill of exchange, made after he has negotiated it, cannot, under any circumstances, be received against the holder; where a person had by a voluntary post-nuptial settlement. conveyed away his interest in an estate, and afterwards executed a mortgage of the same property. his admission that money had actually been advanced upon the mortgage was held not to be admissible on behalf of the mortgagee, who was seeking to set aside the former settlement as voluntary and void, and the declaration of a bankrupt, though good evidence to charge his estate with a debt, if made before his bankruptcy, is not admissible at all, if it were made afterwards. This most just and equitable doctrine will be found to apply to the cases of vendor and vendee, grantor and grantee, and generally to all cases of rights acquired in good faith previous to the time when the admission was made."—*Tayl.*, § 794. A document not admissible as a deposition under Section 33 may be admissible as an admission; *Soojan Bibee v. Achmut Ali*, 21 W. R., 414; 14 B. L. R., App. 3; but where an examination in a rent suit was not properly recorded it was held to be inadmissible as an admission; *Pogha Mahtoon v. Gooroo Baboo Gunesk Ram*, 24 W. R., 114.

19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Admissions by persons whose position must be proved as against party to suit.

Illustration.

A undertakes to collect rents for B.

B sues A for not collecting rent due from C to B.

A denies that rent was due from C to B.

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B.

Note.

Admissions by strangers to the suit.—Admissions of strangers to the suit are receivable only when the issue is substantially upon the mutual rights of such persons and the parties to the suit at a particular time. Thus, where A guaranteed the payment for such goods as the plaintiffs should send or deliver to C in the way of trade, a statement by the principal debtor, C, that he had received goods, would be an admission as against the surety, A, inasmuch as it would be relevant in a suit brought against C. So where A and B are jointly liable to C. So the admissions of a bankrupt, previous to the bankruptcy, are relevant in proof of the petitioning creditor's debt; *Coole v. Braham*, 3 Ex. R., 185; *Tayl.*, § 759.

Admissions by
persons ex-
pressly refer-
red to by party
to suit

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Illustration.

The question is, whether a horse sold by A to B is sound. A says to B—'Go and ask C, C knows all about it.' C's statement is an admission

Note.

The reference must be express.—This rule must not be understood as giving the force of an admission to statements made by a witness, as against the party who calls him. There must be an *express reference for information* in order to make the statement an admission.

Thus, if A says, "I will pay you, if B says I owe it you," B's statement about the matter will be an admission as against A.

So, when the question was as to a forged note, paid by B to A, B said, "If I have paid it away I had it from C, go and enquire of C about it;" C's statement is an admission as against B. "These principles apply whether the question referred be one of law or of fact; whether the persons to whom reference is made, have or have not any peculiar knowledge on the subject; and whatever the nature of the action in which the statements of the referee are proposed to be adduced in evidence." *Tayl.*, § 761. The statements of the referee under such circumstances have sometimes been held conclusive against the person making the reference: under the present Act they are not conclusive (Section 31); but if the person making the reference can be shown to have caused another person to believe something and to act upon that belief, he may, as against that person, be estopped under Section 115 from denying it.

21. Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases :—

Relevance of admission against or in behalf of persons concerned.

(1) An admission may be proved by or on behalf of the person making it when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under Section 32.

(2) An admission may be proved by or on behalf of the person making it when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.⁽¹⁾

(3) An admission may be proved by or on behalf of the person making it if it is relevant otherwise than as an admission.⁽²⁾

Illustrations.

(a) The question between A and B is, whether a certain deed is or is not forged. A affirms that it is genuine, B that it is forged.

A may prove a statement by B that the deed is genuine, and B may prove a statement by A that the deed is forged; but A cannot prove a statement by himself that the deed is genuine, nor can B prove a statement by himself that the deed is forged.

(b) A, the Captain of a ship, is tried for casting her away.

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business, showing observations alleged to have been taken by

him from day to day, and indicating that the ship was not taken out of her proper course. A may prove these statements, because they would be admissible between third parties, if he were dead, under section 32, clause 2.

(c) A is accused of a crime committed by him at Calcutta.

He produces a letter written by himself and dated at Lahore on that day and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under section 32, clause 2.

(d) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue.

(e) A is accused of fraudulently having in his possession counterfeit coin, which he knew to be counterfeit.

He offers to prove that he asked a skilful person to examine the coin, as he doubted whether it was counterfeit or not, and that that person did examine it and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding illustration.

Note.

(1) **An admission cannot be proved in favour of the person making it.**—The rules provided by this section are grounded on the principle that previous statements of the parties ought to be admissible only when the circumstances are such as to render their truthfulness eminently probable. If a man might bring evidence to prove statements made by himself favourable to his own case, nothing would be easier than for a party who had a weak case to strengthen it by making such statements beforehand, or by suborning witnesses to speak to having heard him make such statements. A vast mass of the most worthless evidence would thus be imported into the case. This is guarded against in the present section by the general rule that statements made by a man can be proved, not by or on behalf of himself, but only by or on behalf of his antagonist; so that it will be only such of his statements as make against his cause and favor that of his antagonist that will be let in; and such statements may of course be generally relied on as truthful.

Exceptions.—This rule, however, if enacted without any relaxations would work harshly, as there are some statements which, though they are in the interest of the person making them, are yet from some particular circumstance deserving of especial credit. Such for instance, are the statements mentioned in Section 32 of the Act, to which Illustrations (b) and (c) refer. The entries which a man makes in the regular course of his business are presumably truthful, and though they happen to be in his favor, he ought not to be debarred from proving them as part of his case. In like manner statements against proprietary interest, expressions of opinion as to a public right, custom or other matter of public interest, made as provided in Section 32, (4), expressions of opinion as described in Section 32 (5) are proveable as admissions on behalf of the person making them, as well against him. Practically the effect of this and the following exception is to let in a very large number of admissions as evidence in a man's favor, and it is for the Judge to say what *weight* is to be given to them. So, with regard to the admissions specified in (2) it would, no doubt, be dangerous, as a general rule, to allow a man to prove on his behalf his own statements as to his feelings; but the danger is guarded against by the proviso that the admission, in order to be admissible, must be made about the time when the feeling existed, and be accompanied by conduct rendering its falsehood improbable. So, also, with regard to the cases provided for in (3), of which Illustrations (d) and (e) give instances, the statements in these cases being admissible under Section 9 or 14. In all alike there is something which tends to rebut the probability that what a man says may be unduly influenced by the wish to better his own case.

The principle, on which a statement by a person, is admissible against him but not in his favor was exemplified in the following case.

P's carriage was driven against M's carriage, whereby M's thigh was broken. On the trial of an action by M against P for recovery of damages for the injury, S, a surgeon, was called as a witness for M. M recovered £600 damages against P. S afterwards brought an action against M for his services as a surgeon in attending M after his thigh was broken. The Counsel of S proposed to go into evidence to show what S stated as to the amount of his charge for attendance on M in giving his evidence on the trial of the action by M against P. S's statement at the former trial was held to be inadmissible for him, though it would have been admissible against him. Decision of Crosswell, J. in *Sutherland v. M'Laughlin*, Car. & M., 429 Under the first exception to the present section S would, if he had any entries in his books showing his charges, have been able to prove them; and

his former statement might have been used for the purpose of corroborating him under Section 157.

So, in an action for falsely representing the solvency of a stranger, whereby the plaintiffs were induced to trust him with goods, statements by them at the time when the goods were supplied, that they trusted him in consequence of the representation, might be admissible on their behalf, either under (1) as made in the ordinary course of business, or, under (2), as a statement as to state of mind, made about the time and accompanied by circumstances rendering its falsehood improbable.

Frequently statements made by persons under legal compulsion become admissions in another proceeding. They do not cease to be admissions in Civil cases because made under compulsion. A deposition of a person in suit to which he is no party, is, in a subsequent suit in which he is defendant, evidence against him and against those who claim under or purchase from him, although he is alive and has not been called as a witness; *Soojan Bibee v. Achmut Ali*, 14 B. L. R., Ap., 3. See *post*, Section 33. "Thus affidavits sworn by a party in former legal proceedings, answers filed by him in Chancery in a former suit, evidence given by him in an action at law, or his examination taken in bankruptcy, will be evidence against himself in a subsequent cause;.....though his subsequent opponent was a stranger to the prior proceeding."—*Tayl.*, § 798.

(2) **Admissions relevant otherwise than as admissions.**—Illustrations (d) and (e) show cases in which statements, not proveable on a man's behalf as admissions, may yet be admissible under other provisions of the Code. For example, the recitals in a deed, admissible as a transaction by which a right was asserted. &c., would be admissible under Section 13, though they will be excluded as admissions; *Hurronath Mullick v. Nittanund Mullick*, 10 B. L. R., 263.

Where two defendants denied a former exclusive possession by them, and a partition in their favour, a petition and a written statement by them in a former suit were rightly admitted as evidence against them under this section and Sec. 11; *Gyannessa v. Mobarahan-nessa*, I. L. R., 25 Cal., 211.

Difference between admissions and confessions.—In *R. v. Macdonald*, 10 B. L. R. Appx., 2, Phear, J., observing that there is a distinction in this Act between admissions and confessions, admitted evidence of a statement made by a prisoner to the constable who arrested him explaining how he came by property with the theft of which he was charged. The distinction between admissions and confessions is illustrated by Lord Melville's trial.—29 Howell's St. Tr., 746—764; *Tayl.*, § 724.

22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question.

When oral admissions as to contents of documents are relevant.

Note.

Oral evidence of the contents of documents is irrelevant except when used as secondary evidence.—This is a change from the English law, according to which the oral admission of a party as to the contents of a document is admitted, even when the document might have been produced, as evidence against him. This doctrine was, after great consideration, affirmed by the Court of Exchequer in *Slatterie v. Pooley*, 6 M. & W., 664. In that case the question being whether the debt sued for had been included in the Schedule to a composition deed, and the composition deed being inadmissible for want of stamp, a verbal admission by the defendant that the debt in suit was identical with that included in the Schedule, was rejected by the Original Court on the ground that the contents of a written instrument, inadmissible for want of a proper stamp, cannot be proved by parol evidence of any kind. The Appellate Court, however, held that the evidence ought to have been admitted. "We entertain no doubt," said Parke, B., "that the defendant's own declarations were admissible in evidence to prove the identity of the debt sued for with that mentioned in the Schedule, although such admissions involved the contents of a written instrument not produced; and I believe my Lord Abinger, who was not present at the argument, entirely concurs.....Indeed, if such evidence were inadmissible, the difficulties thrown in the way of almost every trial would be nearly insuperable. The reason why such parol statements are admissible, without notice to produce or accounting for the absence of the written instrument, is that they are not open to the same objection that belongs to parol evidence from other sources, where the written evidence might have been produced: for such evidence is excluded from the presumption of its untruth, arising from the very nature of the case where better evidence is withheld: whereas what a party himself admits to be true, may reasonably be presumed to be so."

The propriety of the rule, however, has been much questioned on the ground that, though what a party himself admits may reasonably be presumed to be true, there is no such presumption in favor

of the truthfulness of the evidence by which such admission must be proved; *Sanders v. Karnell*, 1 F. & F., 356 (Channell, B.) at page 357. "The doctrine," said Penefather, C. B., in reference to *Slatterie and Pooley*, "laid down in that case is a most dangerous one; by it a man might be deprived of an estate of £10,000 a year, derived from his ancestors through regular family deeds and conveyances, by producing a witness, or by one or two conspirators who might be got to swear that they heard the defendant say that he had conveyed away his interest therein, or had mortgaged or had otherwise encumbered it: and thus, by the facility so given, the widest door would be opened to fraud;" *Lawless v. Queale*, 8 Irish L. R., 382. This view has been adopted in the present Act: oral admissions as to the contents of a document are excluded under the present section: written admissions as to such matters are, as will be seen at Section 65 (b) admissible. A party's admission as to the contents of a document, not made in the pleadings, but in a deposition, is secondary evidence, and cannot supply the place of the document itself; *Shekh Ibráhim v. Parvátí Hari*, 8 Bom. H. C. Rep., (A. C. J.) 163. This section will not, of course, exclude admissions which the parties agree to make at the trial, under section 58: in which case it becomes unnecessary to prove the fact so admitted.

Certain admissions not relevant in civil cases.

23. In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given.¹

Explanation.—Nothing in this section shall be taken to exempt any barrister, pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under Section 126.²

Note.

(1) **Admissions made without prejudice, or to buy peace.**—"Confidential overtures of pacification and any other offers or propositions between litigating parties, expressly or impliedly made *without prejudice*, are excluded. This is on grounds of public policy. If this were not so, it would often be difficult to take any steps towards an amicable compromise or adjustment. Lord Mansfield has observed,

that all men must be permitted to buy their peace, without prejudice to them should the offer not succeed."—*Tayl*, § 795.

Whenever, accordingly, litigating parties have made and entertained overtures for a peaceful adjustment of the dispute, the Courts will, no doubt, be disposed to infer that the parties did not intend evidence to be given of the facts communicated in the course and on the faith of the pending negotiation. Letters written, after a dispute has arisen, with a view to compromise and "without prejudice," cannot be used against the party by or on whose behalf they are written; *Hoghton v. Hoghton*, 2 W. & T., 849; 15 Beav., 278, 321.

Admissions made before an arbitrator, do not fall within the protection afforded by the section, but are receivable in a subsequent trial of the cause, the reference having proved ineffectual.—*Tayl*, § 796.

A letter, sent to the opposite party, by a solicitor, expressed to be written "without prejudice," cannot be received as an admission; nor looked at on a question of costs, neither can the reply be admitted, though not guarded in a similar manner."—*Tayl*, § 782; *Walker v. Wilsheer*, 28 Q. B. D., 835; *Paddock v. Forrester*, 3 M. & Gr., 908. When a man offers to compromise a claim, he does not thereby admit it, but simply agrees to pay so much to be rid of the action. There is tradition of a case in which a lawyer's clerk, sued for breach of promise of marriage, objected to the production of his love-letters on the ground that they were signed "Yours very affectionately, without prejudice." In order, however, to make good his contention under this section he would have to show that the understanding between him and the lady as to their letters was that evidence of their contents should not be given.

This protection is not applicable to criminal cases. See Section 29.

(2) **When communications to professional men are not protected.**—The Explanation refers to the obligation on the part of Barristers and others to answer questions as to professional communications made to them in furtherance of a criminal purpose or as to any fact observed showing the commission of a crime or fraud since the commencement of their employment.

24. A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the

Confession caused by inducement, threat or promise is irrelevant.

accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.

Note.

Confessions caused by inducement, threat, or promise are irrelevant.—The saying that “an accused person, confessing, is the best of witnesses” is not to be unreservedly accepted. The Text books, abound in stories of persons who from terror, confusion, the hope of shielding others, weariness of life, a morbid and diseased state of mind or other cause, have recorded confessions, which have subsequently proved to be untrue. Sometimes, when there is a strong case against the accused, they imagine that acquittal is impossible and that their only chance of a light sentence is to make a penitential confession: sometimes, and notably in India, it is to be feared that a confession is wrung out of the accused by a resort to moral or physical torture on the part of the Police. Torture, for the purpose of eliciting the truth from prisoners, was not unknown in English Courts up to the commencement of the 17th century: but the punishment of the rack was formally pronounced illegal by the Judges in 1628. At the present day not only is torture or other inducement forbidden, but the law scrutinizes all confessions with a jealous eye. “Confession,” said Chief Baron Eyre, “forced from the mind by the flatteries of hope or by the torture of fear, comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit ought to be given to it.” In order, however, to exclude a confession, the threat, inducement or promise, which occasioned it, must be of the character described in this section: it must emanate from a person in authority, such as a master or mistress, a magistrate, constable or other official in charge of the accused: it must refer to *temporal* good to be gained or *temporal* evil to be avoided, and therefore, a confession obtained by *spiritual* exhortations is admissible. The law of England, Ireland and America, unlike that of Scotland and other countries subject to Roman law, does not regard penitential confessions to a priest in the light of privileged communications. The advantage to be gained must have *reference to the proceedings against the accused*, so that a confession prompted by a promise of matters having nothing to do with the charge, such as that the prisoner should have some beer, or that he should see his wife, would not be excluded. The inducement held out

need not be a real advantage. It is enough if the Court consider that the prisoner had grounds, which appeared to him reasonable, for supposing it to be so. Nor is it necessary that the inducement shall have proceeded directly from the person in authority to the accused: thus, a threat made to a prisoner's wife might operate to exclude a subsequent confession, if it appeared that the confession was occasioned by it.

Mere exhortations to tell the truth would not exclude subsequent confessions; though, of course, the accused might be urged "to tell the truth" in such a way as to give him clearly to understand that the best thing he could do would be to confess, and a confession so obtained might fall within the scope of this section.

By Section 122 of the Code of Criminal Procedure, Act X of 1882. no Magistrate is to record a confession unless, upon enquiry, he has reason to believe that it was made voluntarily, and he has to attach a memorandum to this effect to the confession: *Empress v. Daji Nursu*, I. L. R. 6 Bom., 288. West, J., excluded a confession on the ground that the Judge's certificate of its being voluntary was not made till several days after the trial. See *Fekoo Mahto v. The Empress*, I. L. R., 14 Cal., 539.

In *R. v. Navroji Dadabhai*, 9 Bom. H. C. Rep. 358, a travelling auditor in the service of the G. I. P. Railway Company, having discovered defalcations in the accounts of the prisoner, who was a booking clerk of the Company, went to him and told him that "he had better pay the money than go to jail" and added that "it would be better for him to tell the truth," after which the prisoner was brought before the Traffic Manager in whose presence he signed a receipt for, and admitted having received, a sum of Rupees 826-8-0. The prisoner was subsequently put on his trial for criminal breach of trust as a servant in respect of this and of other sums. It was held that the words used by the travelling auditor, constituted an inducement within the meaning of this section, and that the receipt signed by the prisoner was, therefore, not receivable in evidence on his trial. In delivering judgment, Sargent, (J., observed:—"Section 24, whilst requiring the inducement to be offered by a person in authority, leaves it entirely to the Court to form its own opinion as to whether the inducement, threat, or promise was sufficient to lead the prisoner to suppose that he would derive some benefit or avoid some evil of a temporal nature by confessing.....No definition or illustration is given of the expression 'person in authority.' It is an expression well known to English lawyers on questions of this nature; and although, as all rules of evidence, which were in force at the passing of the Act, are repealed, the English decisions on the subject can scarcely be regarded as authorities, they may still serve as valuable

guides.....The test would seem to be, had the person authority to interfere with the matter? and any concern or interest in it would appear to be held sufficient to give him that authority, as in *The Queen v. Wurringham* (2 Den. (1. C , 477 n.) where Parke, B., held that the wife of one of the prosecutors who had been concerned in the management of their business, was a person in authority." The master or mistress of the accused, in cases in which the alleged offence was not committed against them, have been held not to be "persons in authority" in the sense of this section. Thus a confession obtained by an inducement held out by the mistress of a girl, accused of the murder of her child, is admissible; *R. v. Moore*, 3 C. & K., 153. A member of a *punchayat* held to determine whether certain persons had disqualified themselves from intercourse with the rest of their caste are not in authority over such persons so as to make their statements inadmissible; *Empress v. Mohan Lal*, I. L.R., 4 All., 46.

Bentham places "the invalidating considerations applicable to the probative force" of confessions under the heads of (1), Misinterpretation; (2), Incompleteness; and (3), Mendacity.

Misinterpretation is where a wrong meaning is put by the witness on some thing said or done by the person supposed to have confessed, and where, accordingly, "that which really is not a confession might be taken and acted upon as such." It is possible that the confessing person may have expressed himself incorrectly and the witness not have gathered his real meaning. An instance of this is the case of an accused person, in whose presence a witness was examined and having been asked whether the accused was the man who committed the crime, replied in the negative: whereupon the accused person exclaimed, "Thank God, here is a man who has not recognized me;" what he really meant was, "Here is a man who has recognized that it was not I."

Incompleteness is when the loose and imperfect language of the confessor has failed to give a correct view of the whole matter confessed.

Mendacity is when, from any of the various motives affecting human action, an intentionally false confession is made. To guard against false confessions, Bentham lays down the following two rules:—

1. "One is that, to operate in its character of direct evidence, the confession cannot be too particular: in respect of all material circumstances, it should be as particular as by dint of interrogation, it can be made to be: why so? Because (supposing it false) the more particular it is, the more distinguishable facts it will exhibit, the truth of

which (supposing them false) will be liable to be disproved by their incompatibility with any facts, the truth of which may have come to be established by other evidence."

2. "The other rule is that, in respect of all material facts (especially the act which constitutes the physical part of the offence) it ought to comprehend a particular designation of the circumstances of *time and place*. For what reason? For the reason already mentioned: to the end that in the event of its proving false, facts may be found by which it may be proved to be so. "I killed such a man" says the confessionalist "on such a day at such a place." Impossible," says the Judge, speaking from other evidence, "on that day neither you nor the deceased were at that place."—*Bentth. Ratio, Evid., vol. vii.*

In *R. v. Weatherspoon and others*, Madras High Court, Easter Sessions, 1874, the prisoners, who were soldiers, were tried for a murderous assault, and it was proposed by the prosecution to give in evidence a statement as to the affair made by one of the accused. It was proved, however, that an officer in the regiment had seen the accused and told him that he might clear himself of the suspicion which the circumstances raised against him. The accused was told to think the matter over and afterwards made a statement. The officer's account of the interview was what I meant to convey to the man was that it might get him out of the scrape." The statement was rejected as having been caused by inducement proceeding from a person in authority. A distinction ought, however, it is submitted, to be drawn between confessions on the one hand, and statements by persons who, so far from confessing, are denying any connection with the offence and explaining facts which bear against them. If a superior tells a subordinate that he will better himself by confessing, the confession is, of course, inadmissible—but if he says, "such and such facts look awkward, you had better explain them if you can," the explanation, if given by way of denying guilt, ought to be admitted: the object of the accused is not to better his position by confessing his guilt but to show that he is not guilty at all. Where a deputy magistrate after excluding the police told an accused person that "what he said would go as evidence against him: so he had better tell the truth" the statement of the accused was held to be inadmissible: *Queen-Empress v. Ucer*, I. L. R., 10 Cal., 775.

A statement intended to be self-exculpatory, may nevertheless amount to an admission of a criminating fact, and, so, be excluded under Section 25 or 26; *Empress v. Pandharinath*, I. L. R., 6 Bom., 84.

Doubts have been felt as to whether under the English law, a prisoner who is in a dilemma, be convicted on a mere extra-judicial confession without corroborative evidence of the corpus delicti. *Engl. Sup.* Under the present law no such doubt will arise. If the confession be legally obtained it will be relevant and the Judge can if he think it under the circumstances sufficient proof of the offence convict upon it in the absence of any other evidence. See notes to Section 30.

It has now been decided that according to English law in order to make a statement by the prisoner admissible it is necessary to prove affirmatively that the statement was not made under the influence of an improper inducement. *R v Thompson* 1893 2 Q B 12. Section 114 of the present Act puts upon the person wishing to prove a fact the burden of proving any fact necessary to enable him to give evidence of it. The present case however is one in which certain evidence *prima facie* admissible is excluded on certain specified grounds and the burden of proving the existence of those grounds must under Section 103 lie on the person who wishes the Court to believe in their existence.

As to confessions before a Court see Cr. P. C. [Act X 1862] Sections 164, 364 and 533.

The fact of a confession being retracted before the trial does not affect its admissibility. Even though retracted in the Sessions Court and uncorroborated it may be ground for a conviction. *R v Bhuttan Lajpoot* 12 Suth W R (Cr. R.) 49. *P v Balwant Pendharla* 11 Bom H C Rep, 137.

A person charged with dacoity made a confession, a promise of pardon was made to him and he made a statement confirming his confession, he then escaped but was re-arrested, his statement made under promise of pardon was held not to be but his confession to be admissible. *R v Radanath Dosadhi* 5 W R Cr. 53. In Bombay there is no rule that a retracted confession must be supported by independent evidence to make a conviction possible, *Empress v Ghanya* F. I. R. 19 Bom 725, and see the cases there quoted.

The averment on the Magistrate's record that the accused before making the confession, was warned that it was optional with him to answer the questions put to him is not conclusive to show that the confession was not made under the influence of fear engendered by previous treatment, or is not otherwise valueless, *R v Kashmath Jinnai*, 8 Bom H C Rep, (Cr. C.) 126.

In England it has been held that in a suit for dissolution of marriage on the ground of the wife's adultery, entries in her

private diary detailing acts of adultery committed with the corespondent and that the defendant had admitted adultery by the corespondent and referred to the admission of collusion on the part of the defendant in the absence of any corroborative evidence. It was held that the injured party was entitled to relief in the absence of any evidence to the contrary. *11 Ind. 291* (P & M) 175. It would seem doubtful whether a confession under Section 10 of the present Act would be an offence and in one sense an action lies in it.

In *R v Hinds* 10 L J R App 1 1167 T refused to admit evidence of a confession made immediately before the defendant had been threatened with a loaded rifle although the threat was not for the purpose of extorting the confession but to suppress any notion of bondship. This refusal seems justified by the section.

25. No confession made to a Police officer, shall be proved as against a person accused of any offence

Confession made to a Police officer not to be used as evidence

Note.

Confessions to Police officers.—There seems to be some doubt as to what amounts to a confession under this section. In *H v Ma d nald* 10 L J R App 2 a statement made by a prisoner to the constable who arrested him accounting for his possession of property with the theft of which he was charged was held to be admissible a distinction being drawn between admissions and confessions. In *Ingrie v Pandhar Nath* 1 L R 6 Bom 34 it was held that when a person in custody told a Police officer that a forged cheque which he was accused of dishonestly using was given to him by K this statement might be proved to show that he had had possession of the cheque. In *Empress v Javich train* 1 L R 19 Bom 363 a confession was held to include any admission of a criminal circumstance on which the prosecution rely. On the other hand when the accused made a statement to a Police officer when arrested and explained that the time of an occurrence which he mentioned was when he struck the deceased it was held that evidence of this explanation was inadmissible, *Queen Empress v Mathews* 1 L R 10 Cal 1022 and as to other similar statements held inadmissible see *Queen Empress v Meher Ali Mullick* 1 L R 15 Cal 589. In *H v Humbole Chunder Ghose* 1 L R 1 Cal 207 the prisoner on his arrest made a statement in the nature of a confession which was reduced into writing by one of the inspectors in whose custody the prisoner was, and subsequently signed and acknowledged by the prisoner in the presence of the Deputy Commissioner of the Police at the Police office,

the Deputy Commissioner receiving and attesting the statement in his capacity as Magistrate and Justice of the Peace. At the trial of the prisoner at the Criminal Sessions of the High Court, this statement was tendered in evidence against him, and admitted by the Judge, who overruled an objection on behalf of the prisoner that, under this section it was inadmissible. On a case certified by the Advocate-General under Clause 26 of the Letters Patent Act, the Judges held that the confession was not admissible in evidence under this section. In delivering judgment, Garth. C. J., observed upon this point "in construing the 25th section of the Evidence Act of 1872, I consider that the term 'police officer' should be read, not in any strict technical sense, but according to its more comprehensive and popular meaning." A Village Munsiff acting under Section 7 of the Madras Village Cess Act is not a Police officer under this section; *Queen-Empress v. Sama Papi*, I. L. R., 7 Mad., 287.

In *Emress v. Petamber Juna*, I. L. R., 2 Bom., 61, it was held that this section does not preclude one accused person from proving a confession made to a police officer by another accused, jointly tried with him; such a confession, however, must not be treated as evidence against the person making it, but merely as evidence in favor of the other. A statement which is inadmissible as a confession under this section may be evidence in an enquiry as to the ownership of property held under Section 523 of the Criminal Procedure Code; *Queen-Emress v. Tribhovan Maneekchand*, I. L. R., 9 Bom., 131.

By Section 163 of the Criminal Procedure Code, Police Officers are precluded from offering any such inducement, threat or promise as is mentioned in Section 24 of the Indian Evidence Act; but are not bound to prevent any statement which a person chooses, of his own freewill, to make.

As to the punishment for causing hurt for the purpose of extorting confession or information which may lead to the detection of an offence, see the Indian Penal Code, Secs. 330, 331.

Confession made by accused while in custody of Police not to be used as evidence.

26. No confession made by any person whilst he is in the custody of a Police Officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation.—In this section 'Magistrate' does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George

or in Burma or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882.—*[Act III of 1891, s. 3.]*

Note.

Confession made while accused is in custody is inadmissible unless made before Magistrate.—Section 25 having excluded confessions to the Police, the present section goes still further in guarding against unfair advantage being taken of the position of a person in Police custody, and excludes all confessions by such persons, the *bona fides* of which is not guaranteed by the immediate presence of a Magistrate. Even as to these, extraordinary precautions are provided by Sections 164, 364 & 533 of the Cr. P. C., 1882.

Thus in *Empress v. Nilmadhub Mitter*, I. L. R., 15 Cal., 595, the accused had made a statement to a Magistrate at Calcutta in the course of a police investigation, confessing to a murder. The accused spoke and understood English and the Magistrate questioned him in English and was answered sometimes in English and sometimes in Bengali. Such answers were taken down in English; but when they had been given in Bengali, they were read over to the accused in English and he accepted the English as expressing the meaning of what he had stated and signed the document in the presence of the Magistrate who affixed the usual certificate thereto. In taking this confession the Magistrate purported to have acted under ss. 164 and 364 of the Cr. P. C. and at the trial, subsequently to the admission of the document in evidence, he was called as a witness and deposed to the above facts. It was held that the document was properly admitted on the evidence of the Magistrate. In a case of murder and rioting depositions made by defendants in support of a countercharge are admissible as evidence against the persons who made them; *Mohar Sheikh v. the Queen*, 1893, I. L. R., 21 Cal., 392.

Where a policeman temporarily left a person in his custody a statement he made was held inadmissible; *Empress v. Lister*, I. L. R., 20 Bom., 165. This section applies to Magistrates and Police officers in Native States; *Queen-Empress v. Nagla Kala*, I. L. R., 22 Bom., 285; and see *Queen-Empress v. Sundar Singh*, I. L. R., 12 All., 595. The keeper of a jail in a Native State, who is not a Police officer, though his subordinates are members of a Police force, is not a Police officer under this section; but *semble servus* when there is such a close custody of a prisoner as may occur when a prisoner is guarded there by the Police officer investigating the offence; *Queen-Empress v. Tatya*, I. L. R., 20 Bom., 795.

So much of statement or confession made by accused as relates to fact thereby discovered may be proved.

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

Note.

Statements by accused leading to discovery of fact.—The “fact” to which this section refers as discovered in consequence of information received from a person in custody of the Police, is generally either the property stolen, or the body of the injured person, or the weapon with which the injury was inflicted, or bloody clothes, or some other material evidence of the offence. When evidence of this kind is so discovered, so much of the accused’s statement as “relates distinctly” to the discovered fact is admissible notwithstanding that the person was in Police custody. This section has been held to be a proviso to s. 24 as well as to s. 25, and therefore may render a statement made to a police officer admissible; *Queen-Empress v. Babu Lal*, I. L. R., 6 Bom. 509.

The words “relates distinctly,” borrowed from Mr. Taylor, are deficient in precision and have sometimes been construed too widely. “It is not, observed West, J., all statements, connected with the production or finding of the property, which are admissible: those only which lead immediately to the discovery of the property and so far as they do lead to such discovery, are properly admissible;” *R. v. Jora Hasri*, 11 Bom. H. C., 242. See too *Empress v. Rama Biraja*, I. L. R., 3 Bom. 12; and *Empress v. Pauchan*, I. L. R., 4 All. 198. In *Adu Shikdar v. Queen-Empress*, I. L. R., 11 Cal., 635, Norris, J., adopted the dictum of Straight, J., in *Queen-Empress v. Babu Lal*, *supra*, that “no judicial officer. . . should allow one word more to be deposed to by the police officer detailing a statement made to him by an accused, in consequence of which he discovered a fact, than is absolutely necessary to show how the fact that was discovered is connected with the accused, so as in itself to be a relevant fact against him.”

The test of admissibility is “was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact being discovered, and as such a relevant fact?” Thus, where a prisoner was charged with stealing some cloths, his

statement that he had deposited the cloths with witnesses who delivered them up on demand was the approximate cause of their discovery and was admissible in evidence. But if he had proceeded to state that they were cloths which he was charged with stealing, that statement would not be admissible for it would not be the immediate cause of, or the necessary preliminary to, the fact discovered; *Empress v. Gommer Sahib*, 1. L. R., 12 Mad., 153. In *Queen-Empress v. Nana*, 1. L. R., 14 Bom., 260, the accused was charged with receiving stolen property; he said "Yes I have kept it. I will point it out. I have buried it in the fields." He then took the police to the spot where the property was buried and disinterred it. It was held that his statement was admissible under this section as it set the police in motion and led to the discovery of the property; and a dictum of Straight, J., in the *Empress v. Paucham*, *ib. sup.* distinguishing between the statement and the action in a similar case was not followed. See too the similar case of *The Legal Remembrancer v. Chema Nashya*, 25 Cal., 413; where Banerjee, J., lays down "that where the statement of the accused is a necessary preliminary to the fact discovered, it is admissible under Section 27 of the Evidence Act, the question whether the statement is sufficient to enable the police to make the discovery by themselves or is only of such a nature as to require further assistance of the accused to enable them to discover the fact being immaterial."

28. If such a confession as is referred to in section twenty-four is made after the impression caused by any such inducement, threat, or promise has, in the opinion of the Court, been fully removed, it is relevant.

Confession made after removal of impression caused by inducement, threat or promise is relevant

Note.

Confession made after removal of impression caused by inducement, &c.—For example, where a magistrate told a prisoner, that, if he was not the actual culprit, and would disclose all he knew, he would use his influence to protect him; but, on subsequently receiving a letter from the Secretary of State refusing mercy, communicated its contents to the prisoner, it was held that a confession, which the prisoner afterwards made to the coroner, who had also duly cautioned him, was clearly voluntary, and was admissible; and where an accused had been induced by promises of favour to make a confession, which was for that cause excluded, but some months afterwards, and after he had been solemnly warned by two magistrates that he must expect death and prepare to meet it, he again fully acknowledged his guilt, the latter confession was received in evidence.—*Tayl.*, § 878.

So, also, a child, charged with theft, was told by her mistress that if she did not tell all about it that night, the constable would be sent for to take her to the magistrate: the constable was sent for and on her to way to the magistrate, the child confessed to the constable; her confession was held to be admissible, inasmuch as the inducement, *viz.*, the promise that the constable should not be sent for was at an end, since he *had* been sent for; *R. v. Richards*, 5 C. & P., 818.

Confession otherwise relevant does not become irrelevant because of promise of secrecy.

29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession and that evidence of it might be given against him.

Note.

Confessions obtained by fraud, &c.—The rule laid down in Section 23 as to admissions in civil suits, does not apply to criminal cases. Here the great object is to ascertain innocence or guilt, and, consequently, so long as the truthfulness of the confession is secured, the law does not regard any limitations imposed by the person confessing as to its future employment against him, nor will it recognize, even in the case of confessions to a spiritual adviser, a promise not to reveal such a confession. Evidence in such cases, is consequently, admissible notwithstanding that the person giving it may have obtained his information in an improper manner, or may be doing a dishonorable act in revealing it; as *e.g.*, where a man has purposely, been made drunk with a view to a confession, or where the accused has been tempted to write to his friends and his letters have been opened, or where he has been led to confess by a false representation that his accomplices have confessed. But it was held by the Bombay High Court that where a pardon tendered to some of the accused by a Magistrate proved to be illegal, their confessions, made under such tender, are wholly inadmissible; and the Sessions Court cannot, by informing the accused of the illegality, and asking them if they still adhere to their confessions, render them admissible; *Empress v. Ham-manta*, L. L. R., 1 Bom., 610.

Statements made by a person talking in his sleep are, of course, no confessions, nor receivable in evidence, though they may be of great indicative value. Best, § 529. Mr. Best quotes a case mentioned in Arbutnot's Reports of Criminal Cases in the Court of Foujdaree Adalat, in which an accused person, who was under surveillance, went through the details of a murder in his sleep, addressing his accomplices. The man on being taxed with the offence admitted his guilt, as did also the persons whom he named in his sleep.

30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

Consideration of proved confession affecting person making it and others jointly under trial for same offence.

Explanation.—‘Offence,’ as used in this section, includes the abetment of, or attempt to commit, the offence.—[*Act III of 1891, s. 4.*]

Illustrations.

(a) A and B are jointly tried for the murder of C. It is proved that A said,—“B and I murdered C.” The Court may consider the effect of this confession as against B.

(b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said,—“A and I murdered C.”

This statement may not be taken into consideration by the Court against A, as B is not being jointly tried.

Note.

Confession implicating others jointly tried.—The policy of this section has been much questioned, and one writer has gone so far as to say that “the best ‘consideration’ which the Court can give to a confession within this section will probably be to hold that it will not act upon it against third parties.” If this means that a Court ought not, unless under circumstances altogether exceptional, to rely on the uncorroborated confession of a co-accused person, the caution is, no doubt, a sound one. But if by “not

acting on it" is meant that the confession is to be banished from the Judge's mind and is not to form one ingredient in the conclusion which he forms about the case, the intention of the section would be altogether frustrated by the course recommended. The reasons for allowing the Judge to take into consideration confessions of this character have been discussed in the Introduction: they follow necessarily from the principle, enforced by Bentham and now generally accepted as the right one, of admitting matter of evidence of every description for what it is worth, unless, from the circumstances of the case, or the character of the Tribunal, some obvious danger or disadvantage would arise from doing so. The exclusion of various pieces of evidence under English Law is owing to the circumstance that it has been considered, on the whole, dangerous to entrust the consideration of them to a Jury; indeed the whole law of Evidence has been shaped with reference to a procedure under which one part of the case is decided by the Judge and one by the Jury. In India, where the functions of Judge and Jury are united in a single official, it is unnecessary to insist upon the exclusion of a class of statements, which, though generally in a high degree suspicious, may yet throw some light on the case and are occasionally of the utmost importance. For example, the approver's evidence, admissible under the Criminal Procedure Code, is infinitely more suspicious, because he has a distinct motive for speaking; yet it is thought on the whole better to have it than not. And so it is easy to conceive circumstances in which a confession by a co-accused would be perfectly safe ground on which to base an inference. See Section 114, Illustration (b).

The proper course clearly is for Courts to carry out the direction of the section, take the confession into consideration, not forgetting how very little it is worth in the generality of cases, but not refusing to assign to it such weight as it deserves.

The general view of the Courts is, however, in the highest degree unfavourable to any but a very limited and cautious use of the section. It must be regarded as a dangerous exception to the general rule, and its wording shows that the confession is merely to be an element in the consideration of the evidence. Unless there is something more, a conviction upon it will still be a case of no evidence and bad in law. Proceedings, 24th January 1878, 7 M. H. C. R., 15. Following this Ruling, the Madras High Court annulled the conviction in *R. v. Hulagu*, I. L. R., 1 M., 163, on the ground "that a conviction based solely upon the evidence of a co-prisoner is bad in law."

The confession of one of the prisoners cannot be used to corroborate the evidence of an accomplice against the others; *R. v. Malapabin*,

Kapana, 11 Bom. H. C. Rep., 196—198; *R. v. Durbaroo Das Sirdar*, 18 Suth., W. R., (Cr. R.) 14. As to the evidence of an accomplice, corroborated or uncorroborated, see Sections 133 and 157.

In *Empress v. Khandia Bin Pandu*, I. L. R., 14 Bom., 66, the accused was convicted solely on the confessions of his fellow-prisoners who were tried jointly with him for the same offence and it was held the conviction was bad. Under this section such confessions could be taken into consideration against the accused, but they were not "evidence" within the definition in s. 3 (*ante*, p. 83) and they could not therefore alone form the basis of a conviction.

In *Empress v. Ashutosh Chucker Will.*, I. L. R., 4 Cal., 483, it was held by Jackson and Macdonnell, JJ., that a confession by one co-accused is not sufficient to support the conviction of the other accused, even when corroborated by circumstantial evidence, unless the circumstances constituting the corroboration would, if believed themselves, support a conviction. It may however be questioned how far this limitation of the effect of the section is justified by its wording. On the same occasion, Garth, C. J., ruled that the question of the weight to be attached to such a confession, and of its adequacy to support a conviction was one for the Judge. In the same case the Court held that the word "Court" in this section included both Judge and Jury.

Where a statement, made by one of the accused inculpating himself and others was subsequently retracted, and the accused made another exculpating himself, the second statement was held to be inadmissible; *R. v. Noorbux Kazi*, L. R., 6 Cal., 279.

The counsel for one accused person may ask questions to prove a confession by another accused. In such a case the Judge ought to instruct the Jury that the confession, so elicited, is not to be treated as evidence against the person making it, but merely in favour of the other accused; *Per Westrop, C. J.*, in *Empress v. Citamber Jina*, I. L. R., 2 Bom., 61.

Confessions by each of two prisoners, taken in the absence of the other and not read over or proved against him, were excluded except against the person confessing; *Empress v. Laksmen*, I. L. R., 6 Bom., 125. See also *Empress v. Chundernath Sircar*, I. L. R., 7 Cal., 65.

In order to render the confession of one prisoner, jointly tried with another, admissible in evidence against the latter, it must appear that the confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used, in the commission of the offence for which the prisoners are being jointly tried; *R. v. Belat Ali*, 10 B. L. R., 453. It seems that a confession by one prisoner will not be relevant against his

fellow-prisoner except just in so far as it is an admission of his own guilt; *R. v. Mohesh*, 10 B. L. R., 455, note; Biswas: 19 W. R. Cr., 16. Where a man and woman were tried under ss. 372, 373 of the Penal Code respectively for selling and buying two girls for purposes of prostitution, the confession of one is not evidence against the other; *Deputy Legal Remembrancer v. Karuna Baistobi*, 1. L. R., 22 Cal., 164.

In *Empress v. Daji Narsu*, 1. L. R., 6 Bom., 288, it was held that a statement by one prisoner, in order to be evidence against another, must amount to distinct confession of the offence charged.

The confession of a person who says he abetted a murder but withdrew before the actual perpetration of the deed by his associates, was held by the Bombay High Court not to be receivable in evidence against the latter, though the person confessing is jointly tried with them on a charge of murder: *R. v. Amritti Govinda*, 10 Bom., H. R., p. 497.

A prisoner who pleads guilty at the trial, and is thereupon convicted and sentenced, cannot be said to be jointly tried with the other prisoners committed on the said charge who pleaded not guilty; *R. v. Kailu Patil*, 11 Bom. H. C. Rep., 146. See too *R. v. Burao*, 21 W. R., 65. Where one prisoner pleaded guilty but was not convicted or sentenced till the conclusion of the trial of another tried for the same offence, it was held that his confession was not evidence against his fellow-prisoner; *Empress v. Pahuji*, 1. L. R., 19 Bom., 195. See too *R. v. Pirbhhu*, 1. L. R., 17 All., 525. A and B were jointly tried, A for murder, B for attempted murder. A had made a confession implicating B. The charge against A was amended to one of abetment of murder and A's confession was rightly used as evidence against both; *R. v. Govind Babli Raul*, 11 Bom. H. C., 278. "When two persons are accused of an offence of the same definition arising out of a single transaction, the confession of the one may be used against the other, though it inculpates himself through acts separable from those ascribed to his accomplice and capable, therefore, of constituting a separate offence from that of the accomplice;" so where A and B were accused of passing counterfeit coin, and A stated that he got the coins from B and passed them on to others at his request, A's statement is admissible as against B; *Queen v. Nur Mahomed*, 1. L. R., 8 Bom., 223. See too *Empress v. Jagat Chundra Mali*, 1. L. R., 22 Cal., 50.

This section would not, in a divorce suit, apply to confessions of adultery by a respondent or co-respondent as against the other party, since such persons are not being "jointly tried for the same offence." The admission of a respondent has been held to be inadmissible as against a co-respondent in England: *Robinson v. Robinson and Lane*,

29 L. J. (Pr. & M.) 17. Such an admission, however, would appear to be admissible under Section 10 of the present Act as the statement of a person who has conspired to commit an offence.

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

Admissions not conclusive proof, but may estop.

As to estoppels, see *post* Chapter VIII, Sections 115—117.

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WITNESSES.

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases :—

Cases in which statement of relevant fact by person who is dead or cannot be found, &c., is relevant.

(1) When the statement is made by a person, as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.⁽¹⁾

When it relates to cause of death ;

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

(2) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary

or is made in course of business ;

course of business, or in the discharge of professional duty; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him, or of the date of a letter or other document usually dated, written or signed by him.⁽²⁾

or against
interest of
maker;

(3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.⁽³⁾

or gives opin-
ion as to public
right or cus-
tom or matter
of general
interest;

(4) When the statement gives the opinion of any such person as to the existence of any public right or custom or matter of public or general interest,⁽⁴⁾ of the existence of which, if it existed, he would have been likely to be aware,⁽⁵⁾ and when such statement was made before any controversy as to such right, custom or matter had arisen.⁽⁶⁾

or relates to
existence of
relationship;

(5) When the statement relates to the existence of any relationship [by blood, marriage or adoption] between persons as to whose relationship the person making the statement had special means of knowledge,⁽⁷⁾ and when the statement was made before the question in dispute was raised.—[*Act XVIII of 1872, s. 2.*]

or is made in
will or deed of
deceased per-
son;

(6) When the statement relates to the existence of any relationship [by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree,⁽⁸⁾ or upon any tombstone, family portrait

or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.⁹¹— *Act XVIII of 1872, s. 2.*

(7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in Section 13, clause (a).⁽¹⁰⁾

or relates to transaction mentioned in Sect'on 13, clause (a);

(8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.⁽¹¹⁾

or is made by several persons, and expresses feelings relevant to matter in question.

Illustrations.

(a) The question is, whether A was murdered by B: or

A dies of injuries received in a transaction in the course of which she was ravished. The question is whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts.

(b) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day, he attended A's mother and delivered her of a son, is a relevant fact.

(c) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned in Calcutta, for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

e) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A, saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

f) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day, is relevant.

(h) The question is, what was the cause of the wreck of a ship.

A protest made by the captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way.

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market. A statement of the price, made by a deceased banya in the ordinary course of his business, is a relevant fact.

(k) The question is, whether A, who is dead, was the father of B. A statement by A that B was his son, is a relevant fact

(l) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(m) The question is, whether, and when, A and B were married.

An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A at a given date, is a relevant fact.

(n) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved.

Note.

(1) **Dying declarations are admissible where the cause of the declarant's death is in question.**—This is an important extension of the former law, according to which it was essential, in order to let in a dying declaration, that the declarant *should have been, and should have thought himself to be, in danger of approaching death.*

According to English law, moreover, such statements are admissible only in cases of homicide, “when the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declaration.” Thus, on a trial for robbery, the dying declaration of the party robbed has been rejected, *R. v. Hutchinson*, L. It. & C., 608, note per Bayley, J.; and where a prisoner was indicted for administering drugs to a woman with intent to procure abortion, her statements *in extremis* were held to be inadmissible; *R. v. Mead*, 2 B. & C., 605; *Tayl.*, § 715.

Under the present section such statements are admissible “whatever be the nature of the proceeding,” as in a trial for procuring abortion, or in a civil action for unskilful surgery: and the statement is admissible whether it is as to the cause of death, *or as to any of the circumstances of the transactions* which resulted in the person's death: it must, however, be in a case in which the cause of the person's death comes into question.

Such a statement would generally, it is apprehended, be relevant, under Section 14, whether the person making it were dead or not. But the statement must be more than a mere expression of assent to another person's statement. Thus “where a statement, ready written, was brought by the father of the deceased to a magistrate, who, accordingly went to the deceased and interrogated her as to its accuracy, paragraph by paragraph, it was rejected in Ireland by Mr. Justice Crampton, who observed that, ‘in a state of languor in which dying persons generally are, their assent could be easily got to statements which they never intended to make, if they were but ingeniously interwoven by an artful person with statements which were actually true.’” *R. v. Fitzgerald*, Jr. Cir. R., 168, 169.—*Tayl.*, § 720.

The English ruling in *R. v. Pike*, 3 C. & P., 598, according to which the dying declaration of a child of such tender years that she could not understand the doctrine of a future state, was rejected, is not

applicable under the present section; nor, it would seem, is the question of the competence of the person to bear testimony one which affects the admissibility of the statement. If it complies with the requirements of this section it is relevant, though, possibly, of small importance.

But dying declarations, other than those now provided for, are inadmissible, unless they can be shown to be relevant under some other section. Thus, where a man was tried on an indictment for murder, the prisoner was not allowed to avail himself of the statement of a stranger, who, on his death-bed, confessed that he had committed the crime; *R. v. Gray, Jr.* Cir. R., 73, per Townsend, *Tayl.*, § 715. Such a statement, however, might, perhaps, be shown to fall within the scope of Clause (3) of the present section.

Signs made in answer to questions have been admitted as verbal statements under this section; *Queen-Empress v. Abdullah*, I. L. R., 7 All., 385.

(2) **Entry made in the course of business.**—The most familiar English case on this subject is that of *Price v. The Earl of Torrington*, Salk., 285: in which the plaintiff, a brewer, brought an action against the defendant for beer sold and delivered. The evidence against the defendant was that the usual way of the plaintiff's dealing was that the draymen or carters, came every night to the clerk of the brew-house, and gave him an account of the beer they had delivered out, which he set down in a book kept for that purpose, to which the draymen set their names; and that the drayman who had delivered the beer in question was dead; but the book was produced and bore his signature. This was held good evidence of delivery of the beer. A deed of conveyance was admitted as evidence against the representatives of a vendor on proof of his signature being genuine; *Abdulla Paru v. Gannibai*, I. L. R., 11 Bom., 690. A register of marriage made by a mughthaid in the discharge of his professional duty and kept by the kazi is admissible and relevant evidence under this section in a suit to recover dower between the parties to a marriage recorded therein; *Zakiri Begum v. Sakina Begum*, L. R., 19, I. Ap., 157; I. L. R., 19 Cal., 689.

Personal knowledge by person making the entry of fact recorded, is not necessary.—If the entry was made in the course of business, no question as to the course of information, on which the entry was based, will affect its admissibility. According to English law such an entry must be based on the *personal knowledge* of the person making it.

Thus "in an action for the price of coals, sold at the pit's mouth, an entry made in the following manner, was rejected. In ordinary course, it was the duty of one of the workmen at the pit, named

Harvey, to give notice to the foreman of the coal sold; and the foreman, who was not present when the coal was delivered, and who was unable to write, used to employ one Baldwin to make entries in the books from his dictation and Baldwin read them over every evening to the foreman. The foreman and the workman whose duty it was to give notice to him, being both dead at the time of the trial, Baldwin was called to produce the book to prove thereby the delivery of the coal in question. Such book was, however, held inadmissible, since the entries, although having been made under the foreman's direction they might be regarded as made by him, as such foreman had no personal knowledge of the facts stated in them, but derived his information at second-hand from the workman, did not possess the same guarantee for the truth of the entries as existed in the cases establishing the principle of receiving entries by a deceased person in the usual course of business—in all of which cases the party making the entry had himself done the business, a memorandum of which he had inserted in his book."—*Tytl.*, § 700 and see *Brain v. Prece*, 11 M. & W. 773.

Under the present section it is not necessary that the person making the entry should have a personal knowledge of the fact recorded; it would be sufficient to show that the entry was made in the ordinary course, and that the question as to how the person making the entry came to know about the matter, though it might affect the weight to be given to the entry, would not affect its admissibility.

Such entries admissible though not contemporaneous.—According to English law, entries made in the course of business must be shown to have been contemporaneous; this is not required by the present section, though, of course, such entries would ordinarily be so.

As to the admissibility and effect of entries in books of account and official records, whether the maker is dead or not, see *post*, Sections 84 and 85.

There are three principal restrictions upon the admissibility of this evidence in English law, namely:

- (i) the necessity that the entry should be by a person having personal knowledge;
- (ii) that it should be contemporaneous;
- (iii) that it should not be an entry of any collateral fact over and above what it was the strict duty of the person entering it to record.

These restrictions have been advisedly omitted by the Legislature, so that courts will be committing an illegality if they exclude any evidence which falls within the terms of the present section. In

R. v. Hanmantá, I. L. R., 1 Bom., 610. it was held that account books containing entries not made by, nor at the dictation of, a person who had a personal knowledge of the truth of the facts stated, if regularly kept in course of business, are admissible as evidence under Section 84, and, *semble*, under Section 82, Cl. 2. Account books, though proved not to have been regularly kept in course of business, but proved to have been kept on behalf of a firm of contractors by its servant or agent appointed for that purpose, are relevant as admissions against the firm. In *Zakeri Begum v. Sakina Begum*, I. L. R., 19 Bom., 690; L. R. 19 I. A. 157 an action for dower. an entry in a register of marriages kept by the Istahad who celebrated the marriage was admitted as evidence of the sum fixed.

(3) **Admissions against interest.**—Illustrations (e) and (f) are specimens of admissions against interest; in (e) because the agent admitted to A that he held moneys, for which he was bound to account to him, in (f) because the clergyman's statement would have exposed him to a criminal prosecution. The English case of *Ivat v. Finch*, 1 Taunt., 141, exemplifies the same rule. This was an action of trespass for taking three mares, the property of the plaintiff. The defendant, who was lord of the manor, justified under a heriot custom; and the sole question between the parties was, whether one Alice Watson, the tenant, was possessed of the mares at the time of her death. The plaintiff contended that she had given them to him some time before, and tendered in evidence her declarations to that effect. Her declaration was admitted by the Appellate Court as having been against her interest.—*Tayl.*, § 792.

The English Courts have differed as to whether an entry by a person, acknowledging the payment of money to himself can be regarded as against his interest, when the entry is the only evidence of the charge of which it shows the subsequent liquidation. Thus, it was questioned whether a receipt by a carpenter of money, paid for repairs, would be considered as against his interest when the Bill was the only evidence of the demand. This refinement is met by the provision of Clause (2) that a memorandum of receipt given in the course of business is always admissible.

A statement charging a person with the receipt of money does not cease to be against his interest although it forms part of a general debtor and creditor account, the balance of which is in favour of the receiver; *Rowe v. Brenton*, 3 M. & R., 267.

An entry of moneys received for a third person need not show for whom they were received, if it can be proved *aliunde* that they were received for a third person; *Ibid*.

A dakhilah or receipt for rent proves the receipt; but there is no hard and fast rule as to how it must be proved itself. So it has been held sufficient that the tenant producing dakhilahs should swear that he received them on payment of rent; *Surja Kanta Acharjee v. Banerwar Shaka*, I. L. R., 24 Cal., 251; following *Taj Mahomed v. Banoo Rasmah*, 12 W. R. 34, and *Madhab Chunder Choudhry v. Promotho Nath Roy*, 20 W. R. 264. See too the judgment of the Full Bench in *Kriteebash Myter v. Rāmdhūn Kharuk*, 7 W. R. 526.

A varaspatia by which a Hindu widow divested herself of her widow's estate in the property was held admissible as being a declaration against her proprietary interest; *Hari Chintaman Dikshit v. Moro Lakshman*, I. L. R., 11 Bom., 89.

The provision rendering relevant any statement, which would have exposed a man to criminal prosecution, is a departure from the English law. The admissibility of such statements was discussed in the "Sussex Peerage case," and it was ruled by Lord Lyndhurst that they were inadmissible, 11 Cl. & Fin., 85, 110.

In the English Courts a distinction is made as to the effects of entries in the course of business, and statements against interest: the latter are admitted as proof of independent matters, which, though forming part of the entry, are not in themselves against the interest of the declarant, as, *e.g.*, an entry by an accoucheur of payment for delivering a child is admissible to prove the date of the child's birth: but with regard to entries in the course of business it has been held that, "whatever effect may be due to an entry made in the course of any office reporting facts necessary to the performance of a duty, the statement of other circumstances, however naturally they may be thought to find a place in the narrative, is no proof of those circumstances;" *Chambers v. Bernasconi*, 1 C. M. & R., 347, 368. This distinction would appear not to be retained in the present section: anything contained in a statement which could be shown to have been made in the ordinary course of business would, it is conceived, be admissible in the same way as anything contained in a statement against interest.

In order that a statement should be deemed to have been "made" by a person it will not, it is apprehended, be necessary to show that it was actually written by him, if it can be shown to have been written under his direction, or to have been superintended and adopted by him. The English law on the subject is thus described by Mr. Taylor:—

"Accounts will be received in evidence as being declarations of a deceased person charging himself, if they were written by him either wholly, or in part, though they were not signed; or if they were

signed by him, though they were written by a stranger. So they will also be, though they were neither written nor signed by the deceased, if either direct proof can be furnished that they were written by his authorized agent, or if that fact can be indirectly established, as, for instance, by showing that the deceased subsequently adopted the accounts as his own, and delivered them in at an audit; nor does it signify in such a case, whether the party who actually wrote the accounts be alive or dead at the time of the trial, though if he be alive, his non-production may be matter of observation. If, however, no proof can be given that the account was either written, or signed, or authorized, or adopted, by the deceased person made chargeable thereby, it cannot be received.”—*Tayl.*, § 682.

It must be remembered that statements “in books of account regularly kept in the course of business” are by Section 84 relevant, irrespective of the presence of the person who made them; such entries, however, must be corroborated in order to charge any person with a liability.

(4) **Matters of public or general interest.**—“The law of England lays down the rule that, on the trial of issues of fact before a jury, hearsay evidence is to be excluded, as the jury might often be misled by it; but makes exceptions where a relaxation of the rule tends to the due investigation of truth and the attainment of justice. One of these exceptions is where the question relates to matters of public or general interest. The term ‘interest’ here does not mean that which is ‘interesting’ from gratifying curiosity or a love of information or amusement, but that in which a class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected. The admissibility of the declarations of deceased persons in such cases is sanctioned, because these rights and liabilities are generally of ancient and obscure origin, and may be acted upon only at distant intervals of time; because direct proof of their existence, therefore, ought not to be required; because in local matters in which the community are interested all persons living in the neighbourhood are likely to be conversant; because common rights and liabilities being naturally talked of in public, what is dropped in conversation respecting them may be presumed to be true; because conflicting interests would lead to contradiction from others if the statement were false; and thus a trustworthy reputation may arise from the concurrence of many parties unconnected with each other, who are all interested in investigating the subject. But the relaxation has not been, and ought not to be, extended to questions relating to matters of mere private interest, for respecting these direct proof may be given, and no trustworthy reputation is likely to arise. We must remark, however,

that, although a private interest should be involved with a matter of public interest, the reputation respecting rights and liabilities affecting classes of the community cannot be excluded, or this relaxation of the rule against the admission of hearsay evidence would often be found unavailing;" *Per* Lord Campbell, C. J., in *R. v. Inhabitants of Bedfordshire*, 4 E. & B., 535, 541. Where a plaintiff relied on certain *ayakut* accounts to prove the inclusion of forest tracts within his zamindari it was held that inasmuch as they were prepared for administrative purposes by village officers they were admissible as evidence, provided they were produced from proper custody and otherwise sufficiently proved to be genuine: as far as admissibility is concerned there is no distinction between evidence of reputation to establish and that to disprove a public right; *Sivasubramanyu v. Secretary of State*, I. L. R., 9 Mad., 285.

Where a letter of the Collector, containing an abstract of the opinions of Zamindars furnished for the use of the Board of Revenue, was tendered as evidence of the custom of a Zamindary, it was rejected by the Committee of the Privy Council, there being, their Lordships said, no reason why some of the Zamindars might not have been called; *Ramalakshmi Ammal v. Sivanantha Perumal Sethurayar*, 14 M. I. A., 570, 17 W. R., 553; but the action of the Board taken on the letter of the Collector might, it is submitted, have been proved under Section 13, of the present Act as a transaction in which the custom was recognized, and the Collector's letter would, in that case, be admissible under Section 9 as explaining the transaction. See note to Section 13.

A statement signed by several witnesses to the effect that a widow of the Kadwa kunbi caste cannot adopt, according to the custom of the caste, without the express authority of her husband was held not to be within cl. (4) of this section as the evidence was required to prove a fact in issue and not merely a relevant fact, *Patel Vandrayan Jehisan v. Patel Manilal Chunilal*, I. L. R., 15 Bom., 565.

(5) Distinctions between "public" and "general" interest abolished.— This does away with a distinction known to English law between matters of *public* interest, *i.e.* affecting the entire community, and matters of *general* interest affecting only some section of it. In the former case, evidence of reputation might be received *from any one*: in the latter, some connection with the place or subject has to be proved. Under the present law, it is necessary in every case alike to show that the circumstances of the person, whose statement is to be proved, were such that he would have been likely to have competent knowledge of the right, custom or matter if it existed.

(6) **Statement must have been made before controversy arose.**—In order that a statement should be admissible under this clause, it must have been made before any controversy as to the matter had arisen. The same provision is made, though in slightly different terms, as to statements admissible under Clauses (5) and (6). This is in accordance with the rule of English law. "No man," says Taylor, "is presumed to be thus indifferent in regard to matters in actual controversy; for when the contest has begun, people generally take part on the one side or the other, their minds are in a ferment; and, if they are disposed to speak the truth, facts are often seen by them through a false medium. To avoid therefore the mischiefs which would otherwise result, all *ex parte* declarations, even those upon oath, are rejected, if they can be referred to a date subsequent to the beginning of the controversy."—*Tayl.*, § 623. In order, however, to have the effect of excluding subsequent statements, the controversy must have been as to the right, custom, or matter under enquiry; and, therefore, the mere fact of a controversy between the parties, if it was not regarding the matter in question, will not operate to exclude the statement. Nor will such a statement be admissible on the ground that it was made with a view to avoid future controversy: or with the direct intention of supporting the declarant's title, or because the declarant stood, or believed that he stood, in the same legal position as the person by whom the statement is adduced.—*Tayl.*, § 630.

(7) **In questions about relationship any special knowledge renders the statement admissible.**—According to English law a certain degree of relationship is necessary in order to make such statements admissible, and statements of illegitimate children, accordingly, have been rejected. *Prima facie* evidence of legitimacy is sufficient to let in the statement of a declarant; *Hitchins v. Eardley*, 2 P. & M., 248. Under the present section the existence of any special means of knowledge on the part of the person making the statement will render it admissible. As to the recital of a family custom in a deed, see *Huronath Mullick v. Nittanund Mullick*, 10 B. L. R., 263.

It has been held that statements made to a plaintiff by deceased relatives as to the date of his birth are covered by this rule; *Ram Chundra Dutt v. Jogeswar Narain Deo*, 20 Cal., 758. In this case in view of Illustrations (h) to (m) of this section, and having regard to the fact that when the Evidence Act was passed the question of hearsay evidence was not so definitely settled as it was later, the decision in *Haines v. Guthrie*, 18 Q. B. D., 819 was not followed. There the question was whether an affidavit, made by a defendant's deceased father, stating the date of the defendant's birth, was admissible for the purpose of sustaining a plea of minority.

Stephen. J., and subsequently the Court of Appeal held that the hearsay evidence was admissible only to prove the pedigree, not to prove particular facts on which the pedigree was to lie. See too *Yashwant Prasad Singh v. Radhakrishnan*, I. L. R., 14 Bom., 312. See too *Dhannull v. Ratan Choudhary*, 4 C. L. R., 24 Cal., 265. In *Shambal Singh v. Radhakrishnan*, 4 C. L. R., 173, it was held that a family priest was a person who had special means or knowledge as to the relationship of members of a family; and in *Sangram Singh v. Rajan Bahi*, I. L. R., 12 C. L., 219; I. R., 17, I. A. 183 it was held that a mukhtar was not. Sub-sec. 5 is subject to the same rules as to the time when the statement which it is sought to make admissible was made as apply to sub-sec. 4. (See the last Note); *Narain Kumar v. Chandu Tam*, I. L. R., 9 All., 467.

(8) **Family Pedigree.** There is a question in the English Courts how far a pedigree purporting to have been compiled, either wholly or in part, from registers and other documents, which are not shown to have been lost, is admissible. In the case of *Darce v. Lowndes*, 7 Scott, (N. R.) 211, a Welsh pedigree, proved to be in the handwriting of one of the ancestors of the plaintiff, was produced from proper custody, but had at its close a memorandum to the following effect: "collected from Parish Registers, Wills, Monumental Inscriptions, Family Records, &c." This was tendered as evidence of the relationship of persons living at the time when the document was framed, but was rejected by the Court of Common Pleas on the ground that it bore on its face a certificate that it was only secondary evidence of existing originals, the absence of which was not accounted for. It was afterwards, however, decided by the Exchequer Chamber that the document was admissible, so far, at any rate, as it recorded facts which the maker might be presumed to have learnt from his personal knowledge of the persons therein described as relations, or from information received by him from some deceased members of what the latter knew, or heard from other members who lived before his time. It is apprehended that under the present section, if the document could be deemed "a family pedigree," any statement in it would be admissible, notwithstanding any memorandum as to the sources from which it was compiled. In *Temma v. Daramma*, I. L. R., 10 Mad., 362, a statement in a document which had been set aside on other grounds was admitted to shew the relationship of the parties there set forth.

In *Ram Narain Kallia v. Monee Bibee*, I. L. R., 9 Cal., 613, the plaintiff sued to recover immoveable property. The defence was the plaintiff's illegitimacy. In support of his case, plaintiff tendered a horoscope which he said was given to him by his mother, had been used at his marriage, and seen by members of the family.

The Court rejected the horoscope, first, as not coming within the class of things specified in the section, and secondly, because the plaintiff did not know by whom it was written. The rejection and its grounds are, in my opinion, open to doubt. In *Satis Chunder Mukhopadhyay v. Mohendro Lal Pathak*, I. L. R., 17 Cal., 849, a horoscope was held to be not admissible to prove the age of the person relying upon it.

(9) **Recital regarding relationship contained in a deed.**—See Note (6) to the present section. A recital in a deed by A, deceased, making provision for B, who was described as A's sister, has been held by the English Courts (along with evidence of reputation,) sufficient evidence to entitle the Court to hold that A and B were legitimate sisters; *Smith v. Tebbitt*, L. R., 1 P. & D., 354.

(10) **Statement in deed of right or custom.**—These are transactions by which a right or custom in question was created, claimed, modified, recognized, asserted or denied, or which are inconsistent with the existence of any such right or custom. The effect of this clause is that a recital or other statement of a relevant fact, contained in any document admissible under Section 13, would be itself relevant, if the party making the statement were dead or non-producible.

(11) **Evidence of general feeling or impression of the public relevant to the matter in question.**—Illustration (ii) gives an instance of the sort of cases for which this clause is intended to provide. The object often is to ascertain not so much the feelings or impressions of individuals as the general feeling or impression of a crowd or other public body. This is to be gathered from the expressions used by individuals forming the crowd, and evidence of such expressions is admissible, though it is often impossible to call the individuals themselves as witnesses.

(12) **Evidence to contradict statement.**—As to evidence, admissible for the purpose of contradicting or corroborating a statement admissible under this section, or of impeaching or confirming the credit of the person making it, see *post*, Section 158.

Evidence in a former judicial proceeding when relevant.

33. Evidence given by a witness in a judicial proceeding,⁽¹⁾ or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or

cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the Court considers unreasonable :⁽²⁾

Provided

that the proceeding was between the same parties⁽³⁾ or their representatives in interest :

that the adverse party in the first proceeding had the right and opportunity to cross-examine ;

that the questions in issue were substantially the same⁽⁴⁾ in the first as in the second proceeding.

Explanation.—A criminal trial or enquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

Note.

Previous depositions when relevant.—The previous section has enumerated eight classes of statements, which may be proved when the person who made them is dead or for other sufficient reason cannot be produced. In the present section the question of admissibility depends not, as in Section 32, on the character of the statement and the subject to which it refers, but on the circumstances in which it was made, *viz.* :

1st, that it was evidence given in a judicial proceeding ;

2nd, that the proceeding is between the same parties or their representatives in interest ;

3rd, that the opposite party had the right and opportunity of cross-examining ;

4th, that the question in issue at the second proceeding is substantially identical with that which was in issue on the first.

If these conditions are complied with, the statement of a witness, who for sufficient reason cannot be produced, may be used as evidence in a subsequent proceeding. The facts stated must, of course, be relevant to the inquiry.

The Local Government has power to direct copies of depositions and exhibits to be received in evidence in certain cases, by virtue of Crim. Proc. Code, §§ 188, 189.

Provision is made in Section 158 for testing the accuracy and, if necessary, rebutting the evidence thus admitted. When a witness is present, his evidence in a former judicial proceeding may always be used to corroborate or contradict him. And, if the witness be a party to the suit, his statements in former judicial proceedings will often be relevant against him as admissions; *Soojan Bibee v. Achmut Ali*, 14 B. L. R., App., 8, and see *post*, Sections 155, Clause (3), and 157: notes to section 21; *C. F. Subramanyam v. Paramaswaram*, I. L. R., 11 M., 116.

In England the answers of a bankrupt on his public examination are not admissible in evidence in proceedings in the same bankruptcy by the trustee against parties other than the bankrupt; *In re Brunner*, 19 Q. B. D., 572.

A statement contained in an affidavit, relative to a pending suit, would be made "in a judicial proceeding."

(2) **Where a witness cannot be found, or is incapable, or cannot be produced without unreasonable delay or expense, his deposition is admissible.**—The inability to produce may be either temporary or permanent; *R. v. Asgur Hossein*, I. L. R., 6 Cal., 774. The provisions of the section are less strict than the English law, which will not, in criminal cases, admit a former deposition of a witness on mere proof that he cannot be found after diligent search, *Tayl.*, § 474n; nor even if it be shown that, being a foreigner, he has left the country without any intention to defeat justice. Under the present section, if either the witness cannot be found, or cannot be produced without unreasonable delay or expense, his deposition will, subject to the provisos of the section, be admissible. See *Empress of India v. Mulu*, I. L. R., 2 All. 646, for an example of a case where Straight, J., considered that a witness whose deposition was read he not being dead and his evidence being reasonably procurable this section did not apply. See too *Queen-Empress v. Burke*, I. L. R., 6 All., 224, where it was held that inconvenience to the witness and the saving of an expense of Rs. 500, were not sufficient grounds for making a deposition admissible.

(3) **"The same parties," i.e., the same in interest not in mere form.**—The parties need not be absolutely identical; the plaintiff in the one case may be the defendant in the other; and there may have been a plurality of parties in the one case and not in the other; as *e.g.*, evidence given in a suit brought by A and others against B would be admissible in a subsequent suit brought by B against A alone, provided that the subject-matter of both suits were substantially the same; *Wright v. Doe d. Tatham*, 1 A. & E., 8. Where, however, one of the parties to the subsequent suit is not a representative in interest of a party to the previous suit, evidence taken in the first suit

is not receivable in the second. Thus, where A died without issue, leaving a widow B, B adopted C under an alleged *anumati-patra* executed by A. D, the uncle of A, died leaving a widow E in whose favour he had executed an *anumati-patra* by the terms of which she was to have the management of his property during the minority of the adopted son, in whom it was to vest on his adoption. E adopted F subsequently to the adoption of C by B. On D's death, B, as the widow of A and adoptive mother of C, sued E, as the widow of D, ignoring F, to establish the fact of her having adopted C under an *anumati-patra* from her husband. F died and E adopted G. In a suit brought by G through his mother and guardian, E, to have the adoption of C, declared invalid, B filed certain depositions of witnesses who had been examined in the suit filed by her against E. The High Court held that the depositions ought not to be received, as the plaintiff, the adopted son G, was not a representative in interest of the widow E, the party to the suit in which the depositions were recorded; *Mrinmoyee Dabee v. Bhobannmoyee Dabee*, 15 B. L. R. 1. To satisfy the requirements of this section the second suit must be brought by or against a party to the first or a representative of the interest which was his at the time of the first trial; *Sitanath Dass v. Mohesh Chunder Chuckerbati*, I. L. R., 12 Cal. 627.

(4) **The questions in issue must be substantially the same.**— This is not to be understood as meaning that *all* the questions in the two proceedings must be identical in order to make evidence given in one admissible in the other. The essential point is that the question in issue should have been so raised in the former suit as to give the parties the opportunity of examining and cross-examining. If in a dispute about lands any fact comes directly in issue, evidence given about it may be used, under the conditions prescribed by Section 33, in an action about other lands; *Doe d. Foster v. The Earl of Derby*, 1 A. and E., 788 at pp. 790, 791. *Tayl.*, § 1687.

The questions in issue may be substantially the same although the character of the inquiry has changed. For instance, a witness was examined before a Magistrate in a case of grievous hurt. The witness subsequently died, and the charge before the Sessions Judge was added of culpable homicide. The evidence of the witness is admissible in the Sessions Court; *R. v. Rochia Mohato*, I. L. R., 7 Cal., 42.

As to the mode of contradicting or corroborating statements relevant under this section, or of impeaching or confirming the credit of the person by whom the statement was made, see *post*, Section 158.

There is one important class of cases in which statements in a previous judicial proceeding are admissible without these conditions. By Section 288 of the Criminal Procedure Code, 1882, it is provided that

in trials before a High Court or Court of Session the evidence of a witness made at the enquiry before the Committing Magistrate may, at the discretion of the presiding Judge, be treated as evidence in the case, if it was duly taken in the presence of the accused; *R. v. Amanulla*, 12 B. L. R., App., 15.

So also as to evidence taken under a commission, when British subjects are being tried under Section 9 of the Foreign Jurisdiction and Extradition Act, copies of depositions made or exhibits produced before the political Agent of the State, in which the offence is alleged to have been committed, may be received in certain cases, Section 10; and so in enquiries ordered by Government under Section 14.

There are numerous instances in which express provision is made by law for the admission of evidence, not given before the Court trying the case. As to commissions to examine witnesses in civil cases, see Ch. XXV of the Code: in criminal cases, Chapters XL & XLI of the Code. As to evidence to be taken in India for suits pending in English Courts, see 22 Vic. c. 20. & 48 & 49 Vic. c. 74, Appendix.

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

Entries in
books of ac-
count when
relevant.

34. Entries in books of account,⁽¹⁾ regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not alone be sufficient evidence to charge any person with liability.⁽²⁾

Illustration

A sues B for Rupees 1,000 and shows entries in his account books showing B to be indebted to him to this amount. The entries are relevant, but are not sufficient without other evidence to prove the debt.

Note.

(1) **Entries in books of account.**—Under the English Common law a party cannot prove, in his own behalf, an entry in his books made by himself. This rule has been however relaxed in favor of Banker's Books by 42 & 43 Vic. c. 11. In India "Subject to the provisions of the Act a certified copy of any entry in a Banker's book shall in all legal proceedings be received *prima facie* evidence of the existence of such entry and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the

same extent as, the original entry is now by law admissible but not further or otherwise." Act XI III, 1891, § 4, applied to Post Office Savings Banks and Money Order Offices by Act I, 1893, § 2. And Courts of Equity can direct books of account to be taken as *prima facie* evidence of the matters stated therein, 30 & 31 Vic. c. 44, *Taylor*, § 711. The present section, which is in conformity with the law of France and America, is a reproduction of the Roman law under which "the production of a merchant's or tradesman's book of accounts, regularly and fairly kept in the usual manner, was deemed presumptive evidence *semiplena probatio* of the justice of his claim; and in such cases, the suppletory oath of the party (*iuramentum suppletivum*) was admitted to make up the *plena probatio* necessary to a decree in his favor."—*Taylor*, § 712. A party may, under this section, corroborate other evidence of a debt being due to him by entries, whether by himself or another, in his cash books, provided the books have been regularly kept in the course of business.

In *Munchershaw Bezouji v. New Dhurumsey Spinning Company*, I. L. R., 4 Bom., 576, it was held by West, J., that where A wrote up B's books of account at intervals of a week or a fortnight, on information or loose memoranda supplied by A, the books, so written up, were not "regularly kept in the course of business," within the meaning of this section. But, supposing it to be shown that the books were habitually so kept and were properly balanced at the close of the year, might it not be urged that they were regularly kept in the course of business? An account book is not relevant to disprove an alleged transaction by the absence of any entry concerning it; *Queen-Empress v. Grees Chander Banerjee*, I. L. R., 10 Cal., 1024.

When a Company, under the Indian Companies' Act, is being wound up, the books, accounts and documents of the Company and the liquidators are, as between the contributories, *prima facie* evidence of all things purporting to be recorded therein; Act VI of 1882, Section 198.

Jumna-wasil Baki papers are not admissible as independent evidence, but may be used by the person, who collected the rents, to refresh his memory, or for corroboration: *Akhil Chandra Choudhry v. Naya*, I. L. R., 19 Cal., 248.

(2) **But are insufficient alone to charge any person with liability.**—This is in accordance with the doctrine laid down in *Rai Sri Kishen v. Rai Hari Kishen*, 5 M. I. A., 432, where it was held that "the production of Banker's books with the entries of the items constituting the demand, kept according to the established custom of Mahajans in India, is not *of itself* sufficient evidence to establish such a claim, strict proof of the debt being required." Backed, however by the

statements of the creditor or other credible testimony, they would be sufficient, as for instance, in *Dwarkan Doss v. Baboo Jankee Doss*, 6 M. I. A., 88, where the admission of the correctness by the defendant was held sufficient evidence to dispense with other evidence, independent of the plaintiff's account books, as to the existence of a debt. See *R. v. Hattamali*, I. L. R., 1 Bom., 610. Where a witness was called by the plaintiff to prove bankers books, it was presumed, in the absence of cross-examination to the contrary effect, that he was speaking from his own knowledge and refreshing his memory by looking at accounts entered up by himself or under his personal supervision; it was therefore held that his evidence was substantial evidence in the case which did not therefore depend upon the banker's books alone; *Dwarkan Doss v. Sant Bakhsh*, I. L. R., 18 All., 92.

Entry in public record, made in performance of duty enjoined by law, when relevant.

35. An entry in any public or other official book, register, or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record is kept, is itself a relevant fact.

Note.

By Act XVII, 1890, § 12. Notwithstanding this section no entry in any book, register or record made by a census officer in the discharge of his duty shall be admissible in any civil proceeding or any proceeding under Ch. XII or Ch. XXXVI of Code of C. P., 1882.

Entries in public records by public servant.—Under this section entries made by Settlement Officers and Village Officials in the record of Rights; records by a Registrar of Births, Deaths and Marriages; minutes of meetings where such minutes are directed by law to be kept, and other like documents, are relevant when the matters to which they refer are relevant. See *Zukiri Begum v. Sukina Begum*, 19, I. Ap., 157.

A certificate of guardianship is not admissible under this section as a book, register or record; *Satischunder Mukopadhyay v. Mohendro Lal Pathak*, I. L. R., 17 Cal., 849. A patwari who prepares a teishkhana register is not a "public servant;" *Baig Nath Singh v. Sukhu Mahton*, I. L. R., 18 Cal., 534.

As to the weight to be given to ish-navisi papers as against satisfactory oral evidence of uninterrupted possession, see *Parquharson v. Dwarkanath Singh*, 8 B. L. R. (P. C.), 504.

Wajibulaz or village papers made in pursuance of Regulation VII of 1822 regularly entered and kept in the office of the Collector are admissible in evidence to add to prove a family custom of inheritance stated therein: *Baboo Mohpoot Singh v. Baee Lohary Kuar*, 7 L. R. I. A., 63. A *batia* or *ka'at* paper filed under the Estates Partition Act, Bengal Act VIII of 1876 is not a record under this section: *Panna Raja, K. Sood Roy*; 25 C. L. 90.

By Section 87 of the Indian Companies' Act, 1882, a copy of the report of Inspectors, appointed under the Act, authenticated by the seal of the Company, is admissible as evidence of their opinion.

Such entries are frequently conclusive proof of the facts recorded.—Thus, the certificate of a District Court granted under Section 4 of Act XXVII of 1861, is conclusive proof of the representative title of the person to whom it is granted; and a certificate, granted under Part VI of the Indian Christian Marriage Act, 1872, is conclusive proof of the marriage having been performed; a certificate of sale is conclusive evidence of such sale under Madras Act VI of 1867, Section 20.

Weight to be given to official reports.—The following remarks of the Judicial Committee are instructive on this subject: "This new dispute was referred to the then Collector, Mr. Wroughton. His report upon it is dated the 7th January 1834. It appears that he examined the depositions sent to the Collectorate in 1815, and other documents, and he records the facts which, in his opinion, are adverse to the claims made on the part of the Zemindar. He also reported in favour of the title of the Pandarum Venkatachellum to the office.

"The Board of Revenue upon this report made a minute on the 30th July 1835, that there existed no ground for questioning the validity of the appointment of the Pandarum.

"One of the objections urged by Mr. Mackeson to the judgment of the High Court was that the Judges had given too much weight to the reports of the Collectors, which they described as 'quasi-judicial proceedings.' It is to be observed, however, that it is the duty of the Collectors, under Section 10 of the Regulation of 1817, to ascertain and to report to the Board the names of the present trustees, managers, and superintendents of the temples, and by whom and under what authority they have been appointed or elected, and whether in conformity to the special provisions of the original endowment by the founder, or under any general rules. They are also, under Section 11, to report all vacancies, with full information, to enable the Board to judge of the pretensions of claimants, and whether the succession has been by descent, or by election, and if so, by whom. The Report,

therefore, of Mr. Wroughton, was entirely within his province, and the line of his duty."

"Their Lordships think it must be conceded that when these reports express opinions on the private rights of parties, such opinions are not to be regarded as having judicial authority or force. But being the reports of public officers made in the course of duty, and under statutable authority, they are entitled to great consideration so far as they supply information of official proceedings and historical facts, and also in so far as they are relevant to explain the conduct and acts of the parties in relation to them, and the proceedings of the Government founded upon them;" *Rajah Muttu Ramalingu Setupati v. Perianayagam Pillai*, L. R., 1 I. A., 209, 288.

Certificate copies of entries made by the Collector under Act VII of 1876 (Land Registration) are admissible under this section for what they are worth; extracts from the quinquennial registers are also evidence; *Shoshi Bhooshun Bose v. Grish Chunder Mitter*, 20 Cal., 940. The dictum of Garth, C. J., in *Saraswati Dasi v. Dhanpat Sing*, I. L. R., 9 Cal., 431 was not followed in this case.

Road cess and collection papers are not evidence, *per se*, but can be used only by the person who made them, for the purpose of corroboration or refreshing the memory; *Mahomed Mahmood v. Safar Ali*, I. L. R., 11 Cal., 409.

In *Lekraj Kuar v. Mahpal Singh*, I. L. R., 5 Cal., 744; L. R. 7 I. A. 63, the question was whether a statement, made in a settlement *mhokassi*, recorded in the Province of Oudh, where officers were directed to be guided by the spirit of the Regulations, but were not bound by them, was admissible under this section. The Judicial Committee overruled the objection that the precise information was not directed by any regulation, and held, that the entry was statement of a relevant fact made by a public officer, and so relevant. This ruling was followed in *Parbutty Dassi v. Purno Chunder Sing*, I. L. R., 9 Cal., 587, where the plaintiff sought to put in admission made in a suit, in 1818, by the defendant's predecessor in title. The only evidence of this admission was contained in the decree in the former suit, the ordinary part of which was prefaced by a short statement of the pleadings. Under the old practice of the Mofussil Courts it was the duty of the Court to enter in the decree an abstract of the pleadings. The entry of the admission was, accordingly held to be relevant under this section.

In *Subramanyan v. Paramaswaran*, I. L. R., 11 Mad., 116, where the appellants sought to make use of certified copies of certain judgments and decrees, not as constituting the matters in dispute *res*

judicata, but as containing summaries or statements made by parties concerned in the management of the plaint properties and as evidence of conduct, it was held that the documents were admissible.

An entry of a tenure in the common registry under Act XI of 1859, Section 39, is not, of itself, *prima facie* evidence of the existence of such a tenure; *Luchmyerata v. Chuttopadhyaya Gorakhand Gossamy*, I. L. R., 9 Cal., 116.

Chittas made by Government for its own use are merely for the information of the Collector, and are not evidence against third persons, for the purpose of proving the tenure or character of the land; *Ram Chunder Sao v. Bunsar Dhar Naik*, I. L. R., 9 Cal., 743.

Evidence by Statute.—Many documents are made evidence by special enactments, see for example Act I of 1859, s. 105, as to log books, Act XV of 1872, s. 80, as to certified copies of marriage register; and for a list of documents made evidence by English law, see the table at the end of Wills on Evidence (1894).

36. Statements of facts in issue or relevant facts, made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts.

Maps and plans
when relevant.

Note.

Maps or plans made by Government for private purposes, or when acting in other than a public capacity, are not admissible under this section; *Junmajoy Mullick v. Dwarkanath Mytee*, I. L. R., 5 Cal., 287; *Ramchunder Sao v. Bunsardhur Naik*, *sup.*

Survey Maps.—Survey officers having no jurisdiction to enquire into questions of title, a survey map is not direct evidence of title in the same way that a decree in a disputed cause is evidence of title, but it is direct evidence of possession at the time of the survey being made; *Nobo Coomar Das and another v. Gobind Chunder Roy*, 9 C. L. R., 305. And although evidence of possession at one particular time might not be sufficient in itself to raise a presumption that the land belonged to the estate at the time of the permanent settlement, yet, coupled with other evidence of possession, it might suffice to raise that presumption; *Syam Lal Sahu v. Luchman Chowdhry*, I. L. R., 15 Cal., 353. See too *Syamu Sunderi Dassya v. Jogobundhu Sootur*, I. L. R., 16 Cal., 186.

As to the presumption in case of maps, see Section 83, *post*.

Statement as to fact of public nature contained in any Act or Notification of Government, when relevant

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the Governor-General of India in Council, or of the Governors in Council of Madras or Bombay, or of the Lieutenant-Governor in Council of Bengal, or in a notification of the Government appearing in the *Gazette of India*, or in the *Gazette* of any Local Government, or in any printed paper purporting to be the *London Gazette* or the Government Gazette of any Colony or possession of the Queen, is a relevant fact.

Note.

Recital in Act, or Government Notification.—By Section 7 of Madras Act 1 of 1867, a recital in any Act of the Governor in Council of a public nature is *prima facie* evidence of the fact recited. The necessity for this provision is removed by Section 114 which would justify a Court in presuming the truth of any fact recited in an Act either of the Supreme or Local Councils. See further Section 81.

As to the effect of a notification of a cession of territory, see *post*, Section 118.

Statements in law-books.

38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

Note.

Statement in law-books.—As to other modes of proving the law of a country, see Section 45 and note thereon. As to the presumption in the case of such books, see Section 84. This section is subject to the Indian Law Reports' Act XVIII of 1875.

HOW MUCH OF A STATEMENT IS TO BE PROVED.

39. When any statement of which evidence is given forms part of a longer statement, or of a conversation or part of an isolated document, or is contained in a document which forms part of a book, or of a connected series of letters or papers, evidence shall be given of so much and no more of the statement, conversation, document, book, or series of letters or papers, as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made.

What evidence to be given when statement forms part of a conversation, document, book, or series of letters or papers.

Note.

Only such portions of any statement, conversation, document, &c., as are necessary to explain the statement proved shall be received. — The old rule of Common law was that when one party had put in an extract from a document, or asked a question as to a particular statement in a conversation, the other party was entitled to have the whole document read, or to prove anything else that was said in the same conversation. The inconvenience and injustice, however, in which such a practice would have resulted, led to the rule being greatly narrowed by the Courts in its application: and the English law is now to the same effect as the present section. It is easy to see the necessity for the rule of admitting only such other portions of any statement, conversation, document, &c., as are necessary to explain the statement proved. If it were not for such a rule the mere fact of a witness being asked a question about a conversation might be made the pretext for getting in various statements which obviously ought not to be admissible. Take for instance, a case in which the plaintiff sued the defendant for having maliciously arrested him for debt, the plaintiff contending that the advance had been a gift and not a loan; a witness for the plaintiff acknowledged on cross-examination that he had heard the plaintiff admit on oath that he had repeatedly been insolvent, and had been remanded by the Court; whereupon he was asked in re-examination whether the plaintiff had not, on the same occasion, expressly stated that the money was given, and not lent. It is obvious that, though both these statements were made in the course of the same conversation, the one was in no way necessary to

explain the other; and that the plaintiff's statement that the advance was a gift and not a loan, being an admission, could not properly be proved by him or on his behalf; *Prince v. Samo*, 7 A. & E., 627. See Section 21.

"With regard to letters, a party may put in such as were written by his opponent, without producing those to which they were answers, or calling for their production. For in such case, the letters, to which those put in were answers, are in the adversary's hands, and he may produce them, if he thinks them necessary to explain the transaction."—*Tayl.*, § 734.

JUDGMENTS OF COURTS OF JUSTICE WHEN RELEVANT.

Previous judgments relevant to bar a second suit or trial.

40. The existence of any judgment, order or decree, which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial.

Note.

Previous judgment is relevant where it bars a second suit.—

This section provides for the cases in which a suit is barred by force of the Civil Procedure Code on the following grounds; (1) that a suit, in which the matter in issue is also directly and substantially in issue, has been previously instituted for the same relief between the same parties or those whom they represent, and is pending in a Court of competent jurisdiction in British India, or in any Court of competent jurisdiction established by the Governor-General in Council beyond British India, or before Her Majesty in Council: C. P. C.—Act XIV, 1882; Section 12:

(2), that the suit or matter in issue has been substantially in issue in a former suit between the same parties or those under whom they claim, litigating in the same title, in a Court of jurisdiction, competent to try such subsequent suit or the suit in which such issue has been raised, and has been heard and finally decided by such Court: C. P. C., Section 13:

(3), that the relief sought forms part of a claim, for which the plaintiff omitted to sue in a former suit; or was one of several remedies in respect of the same cause of action, for which the plaintiff, in a former suit, omitted, without the leave of the Court, to sue: C. P. C., Section 43.

Under the first of the grounds the order admitting the plaint of the former suit would be relevant: in the second and third the judgment. The subject of "res judicata," which English Text Books treat as a branch of the Law of Evidence and which has given rise to such prolonged controversy, belongs properly to Procedure and is now, so far as Indian Courts are concerned, regulated by the provisions of the Civil Procedure Code. Whether a suitor ought ever to be allowed to reopen a question once decided between him and the defendant, and if so, by what limitations the right to do so should be restricted, are questions of policy which, owing to the intricacy and confusion in which the subject is involved, have never yet, probably, received adequate consideration. The subject, however, does not belong in any proper sense to the Law of Evidence, whose province it is simply to provide the means by which the parties to suits may prove any right to which the legislature entitles them. The present section, accordingly, is so worded as to carry out whatever may be the existing law as to "res judicata."

There is some reason for thinking that the rule as now laid down is somewhat stricter than it ought to be, consideration being had to the poverty and ignorance of the preponderating majority of litigants; especially when we take into account the extended effect given to Section 13 of the Civil Procedure Code by Explanations II and III. By Explanation II any matter, which might and ought to have been made a ground of defence or attack in the former suit, is deemed to have been a matter "directly and substantially in issue" in that suit. By Explanation III any relief claimed in the plaint which is not expressly granted by the decree is deemed to have been refused. In a recent case, (Special Appeal 249 of 1881) Garth, C. J., observed: "I quite agree with my brother Mitter that this decision, which I feel bound to adopt, will be productive of injustice; but this is no unusual consequence of the law of res judicata. The more I see of the working of that law in this country, the more satisfied I am that, instead of being a beneficial law, it is, as a rule, very much the reverse. No doubt it puts a stop to a certain amount of litigation, and it enables the Courts to dispose of a larger number of cases in a given time. But it too frequently bars the door to justice, and operates with special severity upon the poorer and more ignorant classes."

A decision is "final" within the meaning of the section 13 of the C. P. C. and Explanation IV of that section, when the Court which delivered it, could not (except on review) alter it on the application of the parties or reconsider it on its own motion. The possibility of an appeal accordingly does not prevent a judgment being

final. An *ex parte* decree is not final so long as it is open the Court to revise it: *Nilmoney Singh v. Heeralall Dass*, I. L. R., 7 Cal., 25, and see further *Modhusudun Shuha Mundul v. Brae*, I. L. R., 16 Cal., 800.

It was laid down in *Guju Lall v. Fattah Singh*, I. L. R., 6 Cal., 171, with reference to this section, that a former judgment, not admissible under Sections 40—44, is not relevant as between persons who were not parties to the former suit, either as “a transaction” under Section 13, or a fact under Section 11 or any other section. In this case, in a suit between A and B, the question was whether Cor D was heir to H. This question had been decided in a former suit between X and A. The judgment in the former suit was held to be not admissible.

A plaintiff cannot use as evidence against his tenant, the defendant, decrees obtained by plaintiff's predecessor in title against the persons registered at the time of the decree as tenants, the defendant having been at the time the owner of the tenure by foreclosure but not having registered the transfer in the plaintiff's books and not having been joined in the suits in which the decrees were passed; *Ram Narain Rai v. Ram Coomar Chunder Poddar*, I. L. R., 11 Cal., 562.

As to foreign judgments, Explanation VI to Section 13 of the C. P. Code provides that the production of a foreign judgment, duly authenticated, shall raise a presumption that the Court, which made it, had competent jurisdiction. Section 14 provides various restrictions on the effect of a foreign judgment in barring a subsequent action. It has not this effect, if either it (a) was not given on the merits of the case: or (b) appears to be founded on an incorrect view of international law or the law of British India: or (c) is contrary to natural justice: or (d) has been obtained by fraud: or (e) sustains a claim founded on a breach of any law in force in British India.

The effect of foreign judgments and the restrictions subject to which the Courts will enforce them, was considered by Lord Blackburn in *Schibsby v. Westenholz and others*, L. R., 6 Q. B., 155. It was there held that a judgment of a French Court, obtained in default of appearance, against the defendant, who was not a French subject nor resident in France, could not be enforced in an English Court, because there was nothing to show any obligation on the part of the defendant to obey the judgment. It was observed that if the defendants had been French subjects, or resident in France, so as to owe temporary allegiance, at the time when the action commenced, and, probably, if the contract had been made in France, the judgment would have been enforceable in an English Court; but it seems that

the observation must be limited to the interpretation of the contract; *Sirdar Gurdial Singh v. Rajah of Faridkot*, 1834 A. C., 670; I. L. R., 22 Cal. 222. Whether a defendant, by merely appearing to defend the suit before a foreign tribunal, puts himself thereby under an obligation to obey its judgment, is a more doubtful point. *De Cosse Brissac v. Ruthbone*, 6 H. & N., 301, is an authority in favor of the view that if he voluntarily appears and takes the chance of a judgment in his favor, he is bound. On the other hand a defendant who appears merely to try to save property, which is in the hands of a foreign tribunal, can scarcely be said to appear voluntarily. It is to be observed that a foreign judgment will not, under Section 14 (b) of the C.P.C. Act XIV, 1852, bar a suit, if it appears on the face of it to be founded on an incorrect view of international law or any law in force in British India. This rule, which was favored by the dicta of several Judges and by the author of Smith's Leading cases in *Doe v. Oliver*, is opposed to the view expressed by Lord Blackburn in *Godard v. Gray*, I. R., 6 Q.B., 153. See also *Castrique v. Imrie*, I. R., 4 E. & I. A., 427. In that case the question was as to the validity of a judgment and sale by a French Court of an English ship on an instrument executed originally between English parties, the French Court having acted apparently under a misapprehension of English law. Lord Blackburn observed: "We think the inquiry to be, first, whether the subject-matter was so situate as to be within the lawful control of the State under the authority of which the Court sits: and, secondly, whether the Sovereign authority of that State has conferred on the Court jurisdiction to decide as to the disposition of the thing, and the Court has acted within its jurisdiction. If these conditions are fulfilled, the adjudication is conclusive against all the world." The principles in which an English Court will enforce a foreign judgment are further discussed in *Rousillon v. Rousillon*, 14 Ch. D., 351.

As to the mode in which judgments, &c., are to be proved, see Sections 76 and 77. As to the presumption raised in the case of any record or memorandum of evidence, see Section 80, and, in the case of a judicial record of a foreign country, Section 86.

41. A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific

Judgments in probate, &c., jurisdiction.

thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing is relevant

Such judgment, order, or decree is conclusive proof that any legal character which it confers accrued at the time when such judgment, order, or decree came into operation

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment order, or decree declares it to have accrued to that person,

that any legal character which it takes away from any such person ceased at the time from which such judgment order or decree declared that it had ceased or should cease

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment order or decree declares that it had been or should be his property

Note.

A final judgment of Courts of probate, matrimonial, admiralty or insolvency jurisdiction is conclusive proof of character or title declared—Provision is here made for the much debated subject of the judgment *in rem* phrase which has been used in English Courts (not always with a very accurate appreciation of its history and meaning) to denote certain judgments which are conclusive not only as against the parties to them but as against all the world. As to the matters about which such judgments could be pronounced and the Courts who were competent to pronounce them the judgments of the Courts have exhibited some hesitation and controversy of opinion. Some judgments declaratory of status have been regarded as judgments *in rem* and conclusive as against all the world irrespective of the character of the proceedings in which they were obtained and the tribunal by which they were delivered. For instance, decisions of the ordinary Courts on questions of legitimacy and

adoption have been said to be binding. In the latter judgments, however, the principle is applied to cases thus affected by the latter fact.

The last judgment of the Privy Council is a clear and elucidated judgment. It is the only one in which the *Indulekha* doctrine is not applied. In *Indulekha* (2 M. H. C. 276) the Privy Council (page 288) came to the conclusion that the Privy Council's decision is conclusive only against the parties to the case and not against them as subject to certain conditions which are not of positive law and that the facts of the case are generally held to be binding on all subsequent cases. The nature of the proceeding in which the Privy Council is generally not subject to the same principle as in the case of the judgment against the estate of the late *Kanhyalal* (7 S. 117) where the subject is a Hindu's will. In the latter case reference to the full bench by Lord C. J. is not made. Under the present Act the only judgments to which all wills thus opposed to be a party and which are universally binding are those passed by the Courts and on the subjects specified in the section. Judgments declaratory of status passed by a Court exercising any other jurisdiction such as ordinary decrees declaratory of adoption or legitimacy will not be operative except against the parties to the judgment and their representatives as provided by Section 40.

Probate of Hindu Wills.—So far as regards the effects of a grant of Probate of Hindu Wills this is an alteration of the law as previously laid down by the Courts. In *Shri Lal Bahadur* (1 L. L. R. (O. C.) 24) Norman J. ruled that grant of probate of a will in the case of Hindus conferred no title on an executor but that he derives his title from the will itself and that probate was evidence of his title only so far as a decree of the Court granting it would be so between the parties and those privy to the suit in which the decree was made. Probate is now evidence of the executor's title against all the world but it must be remembered that a Hindu executor has not necessarily the same powers as one under English law and that he is not empowered to alienate except as directed by the will or as necessitated by the case. *Srimati Jaylaxi Devi v. Shubnath Chatterjee* (2 B. L. R. (O. C.) 1).

This section is applicable to probates granted prior to the passing of the Hindu Wills Act, (*Gurush Chunder Roy v. Loughton*, 1 L. R. 14 Cal., 961).

Sections 167 and 190 of the Indian Succession Act 1925, enact that no right as executor or legatee under a Will or to any part

of the property of an intestate can be established in any Court of Justice unless a Court of competent jurisdiction *within the Province*, has granted Probate or Letters of Administration. This is modified by Act XIII of 1875 as to Probates and Letters of administration granted after the 1st April 1875, which, unless otherwise directed by the grant, have effect throughout the whole of British India.

Orders under the Indian Companies' Act, 1882.—Another class of orders, which are conclusive as against all the world are orders made upon a contributory under the "Indian Companies' Act, 1882." By Section 155 of that Act, such an order is conclusive evidence that the moneys ordered to be paid are due, "and all other pertinent matters stated in such order are to be taken to be truly stated as against all persons and in all proceedings whatsoever."

The words "order or decree" in the last three paragraphs were added by Act XVIII of 1872.

Judgments
relating to
public matters.

42. Judgments, orders, or decrees other than those mentioned in section forty-one are relevant if they relate to matters of a public nature relevant to the inquiry; but such judgments, orders, or decrees are not conclusive proof of that which they state.

Illustration

A sues B for trespass on his land. B alleges the existence of a public right of way over the land which A denies.

The existence of a decree in favour of the defendant, in a suit by A against C for a trespass on the same land, in which C alleged the existence of the same right of way, is relevant, but it is not conclusive proof that the right of way exists.

Note.

Judgments relating to public matters are relevant but not conclusive.—This corresponds with the English law on the point. Such judgments are, in fact, admissible as evidence of reputation on the matters in dispute—*Tayl.*, § 1683. Bentham considers that *res inter alios judicatu* ought to be admitted and its value considered by the jury; 3 *Benth Jud. Evid.*, 431.

The nature of a class of tenures, *e.g.*, Ghatwali Tenures in Bheerboom, and the effect of the permanent settlement thereon, would be a 'public matter' as to which judgments, not between the parties, would be relevant under this section; *Rajah Nilmoni Singh v. Bakranath Singh and Secretary of State for India*. L. R. 9 I. A.,

174. Where it was a question whether a custom existed which allowed a raiyat to sell his holding, it was held that a judgment of the High Court as to the transferability of similar tenures in an adjoining village of the same pergunnah was admissible. *E. Dalglish v. Guesser Hussain*, I. L. R., 23 Cal., 427.

In *Ramasami v. Appava*, I. L. R., 12 Mad., 9, it was held that judgments in a claim by the trustees of a temple for money alleged to be due from certain lands were relevant as relating to matters of a public nature.

In *Rameshwar Pershad Nordin Singh v. Koorj Behari Puri*, I. L. R., 6 I. A., 33, evidence of proceedings, viz. criminal proceedings and a razinama come to, in consequence, between other parties, was admitted in support of a presumption of a legal right to enjoy the water in dispute.

Decrees in Chancery between other parties are admitted in land cases to explain the character in which the possessor enjoyed the land: they are not conclusive as to the right. *Darrie v. Lourdes*, 1 Bing., (N.C.) 606.

43. Judgments, orders or decrees, other than those mentioned in sections forty, forty-one and forty-two,⁽¹⁾ are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provision of this Act.⁽²⁾

What judgment, &c., are not relevant.

Illustrations.

(a) A and B separately sue C for a libel which reflects upon each of them. C in each case says that the matter alleged to be libellous is true, and the circumstances are such that it is probably true in each case, or in neither.

A obtains a decree against C for damages on the ground that C failed to make out his justification.

The fact is irrelevant as between B and C

(b) A prosecutes B for adultery with C, A's wife

B denies that C is A's wife, but the Court convicts B of adultery

Afterwards, C is prosecuted for bigamy in marrying B during A's lifetime. C says that she never was B's wife

The judgment against B is irrelevant as against C.

(c) A prosecutes B for stealing a cow from him. B is convicted.

A, afterwards, sues C for the cow, which B had sold to him before his conviction. As between A and C, the judgment against B is irrelevant.

(d) A has obtained a decree for the possession of land against B. C, B's son, murders A in consequence.

The existence of the judgment is relevant, as showing motive for a crime.

(e) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue. [*Act III of 1891, s. 5*].

(f) A is tried for the murder of B. The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under Section 8 as showing the motive for the fact in issue. [*Act III of 1891, s. 5*].

Note.

(1) Having now disposed of judgments which render the matter *res judicata* between the parties, judgments which from their special character are conclusive against all the world, and judgments which as relating to matters of a public nature, are relevant, though not conclusive, between strangers to the suit, we come to the general rule of exclusion, *viz.*, that all other judgments are irrelevant. To this rule, however, there is a highly important limitation. A judgment, though inadmissible for proving the truth of what it asserts, may be valuable as evidence for some other purpose. Its very existence may be a fact in issue, and then, of course, evidence of it may be given: or it may be a fact relevant within some one of the classes of relevant facts given in the Act, and then, again, evidence of it can be given. For instance, the question is whether damage has been occasioned to A in consequence of the negligence of his servant B in injuring C's horse. A judgment in an action in which C recovered damages against A for injury occasioned to his horse, is conclusive proof against B that C did recover such damages. So, again, A sues B for malicious prosecution. The judgment of a Court by which he was acquitted is conclusive proof against B that he was so acquitted. This rule was laid down by Mr. Justice Stephen that all judgments are conclusive as against all the world of the existence of that state of things which they actually effect, when the existence of that state of

things is relevant or in issue; *Steph. Dig.*, Art. 40. But such a judgment is not admissible for the purpose of proving the truth of what it asserts. For instance, in a prosecution of A for forgery of X, a judgment of the Civil Court finding that the signature on X was forged and directing a prosecution, is inadmissible as evidence of the forgery; *Gopaul Chunder Ghose v. Empress*, I. L. R., 6 Cal., 247. See too *Gujja Lal v. Pateh Lal*, I. L. R., 6 Cal., at p. 192.

By Section 137 of the Civil Procedure Code, a Civil Court may, of its own accord, or on application of any of the parties, supported by the necessary affidavit, send for the record of any other suit or proceeding, either from its own records or from any other Court, and inspect the same. The section, however, provides that nothing therein contained shall be deemed to enable the Court to use in evidence any document which under this Act would be inadmissible in the suit.

In *Ragunada Rau v. Nathamuni, Tathamayyagaru*, 6 M. H. C. R., 423, the Judges considered the doctrine, laid down in the English Courts, that a conviction by a Magistrate, who has jurisdiction over the subject-matter, if no defects appear on the face of it, conclusive evidence of the facts stated in it. See *Brittain v. Kennard*, 1 B. & B., 482.

It was provided by 11 & 12 Vict. c. 44, s. 2, that no action shall be brought against a Magistrate for a wrong done by any order made by him until after the said order has been quashed. This might have had an important bearing on proceedings against a Magistrate governed by Act XVIII of 1850, but Scotland, C. J., considered that the English rulings had not established the absolute conclusiveness of the finding in a Magistrate's conviction or order, and that, at any rate, the doctrine had never been enforced in this country.

Under the present Act there can, it would seem, be no question that a Magistrate's order, unreversed, would not be conclusive of the facts stated therein as against a party suing him in respect of such order.

(2) Though a judgment may be inadmissible for the purpose of proving or disproving the facts to which it refers, it may be relevant either for the purpose of proving that such a judgment was made, supposing that to be one of the facts in issue, or as supplying motive, as in Illustration (d), or as explaining the relations of the parties, or under any of the provisions of the Act as to relevant facts. Thus by Section 54 (*post*) the fact that an accused person has been previously convicted is relevant in a criminal proceeding. So too a judgment may be admissible for the purpose of proving a previous conviction against a witness and so discrediting him. See *post*, Section 153.

Judgments are sometimes relevant as admissions. For instance, A sues B, a carrier, for goods delivered by A to B. A judgment recovered by B against C, to whom he had delivered the goods, is an admission by B that he had them; *Steph. Dig., Art., 44.*

Fraud, collusion and incompetency of Court, may be proved

44. Any party to a suit or other proceeding may show that any judgment, order, or decree which is relevant under section forty, forty-one, or forty-two, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

Note.

How a judgment may be avoided.—This is somewhat wider than the English law. In England a stranger, against whom a judgment is offered in evidence, may always avoid it by showing that it was obtained by fraud or collusion. Whether an innocent party to the judgment may prove in another Court that it was obtained by fraud is not equally clear, as it would be in his power to apply directly to the Court, which pronounced the judgment, to vacate it: but a *guilty* party would certainly not be allowed to defeat a judgment by showing that he had practised an imposition on the Court.—*Tayl.*, § 1713.

This point is not referred to in the present section; a party to a judgment, who endeavoured to avoid it by showing that it was procured by his own fraud, would, no doubt, be precluded from doing so by the rule that no man can take advantage of his own wrong: *Rumsey v. North Eastern Railway Company*, 14 C. B., (N. S.) 641, even if he were not estopped under Section 115. The section, however, clearly entitles an innocent party to a former action to show that the judgment in it was obtained by some other person's fraud.

The words "not competent" here used mean not having jurisdiction: *Kettilamma v. Keluppan*, I. L. R., 12 Mad., 228. A purchaser of land may prove by virtue of this section that a previous decree as to the same land in favour of a mortgagee was obtained by fraud; *Nilmony Mookhopadhyaya v. Aimunissa Bibee*, I. L. R., 12 Cal., 156.

OPINIONS OF THIRD PERSONS WHEN RELEVANT

Opinions of experts

45. When the Court has to form an opinion upon a point of foreign law,⁽¹⁾ or of science or art,⁽²⁾ or as to identity of handwriting, the opinions upon

that point of persons specially skilled in such foreign law, science or art, [or in questions as to identity of handwriting] are relevant facts."¹ *Act XVIII. 1872.*
s. 4 .

Such persons are called experts.

Illustrations.

(a) The question is, whether the death of A was caused by poison.

The opinions of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant.

(b) The question is, whether A, at the time of doing a certain act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act, or that he was doing what was either wrong or contrary to law

The opinions of experts upon the question whether the symptoms exhibited by A commonly show unsoundness of mind, and whether such unsoundness of mind usually renders persons incapable of knowing the nature of the acts which they do, or of knowing that what they do is either wrong or contrary to law, are relevant.

(c) The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant

Note.

(1) "**Foreign Law**" would, it is apprehended, include usages and customs of a foreign country having the force of law. In England it has been doubted whether, on a point of Foreign law, the Court was at liberty itself to consult foreign law books, except so far as they have been introduced by counsel in their argument; foreign laws and customs must, it is considered, be proved by calling an official or professional person to give an opinion about them: nor in England can the law of a foreign country be proved even by a juriconsult, if he has acquired his knowledge of it solely from study at an University in another country; *Bristow v. Sequeville*, 5 Ex., 275: 19 L. J.,

Ex. 289: *In the matter of Bennett*, L. R., 1 P. D., 69. These experts may, however, be called to the aid of authority to the Court, and the Court, having received the necessary explanation, may construe them for itself: *Supp. Reg. Act*, 49. Such a person's opinion would, under the provisions of Act, be relevant as that of one specially skilled in the matter. But it would not be essential to call him, as, by Section 88, statements of law in books and reports are relevant; by Section 56 the Court may refer to any such book for information; and by Section 54 the Court is to presume any such book to be genuine.

The law of a foreign country is a matter of fact to be decided on the evidence of advocates practising there, but if they refer to a Code the Court may examine it; *Doncha v. Murietta*, 40 C. & D., 548.

In *Castaño v. Imeri*, L. R., 4 L. & J. A., 427, Lord Blackburn observed, "All that can be required of a tribunal adjudicating on a question of foreign law, is to receive and consider all the evidence as to it which is available, and *bonâ fide* to determine on that, as well as it can, what the foreign law is. If from the imperfect evidence produced here, or its misapprehension of the effect of that evidence, a mistake is made, it is much to be lamented, but the tribunal is free from blame." By Section 14 of the Civ. Pro. Code, 1882, however, a foreign judgment may be impugned on the ground that it is founded on an incorrect view of international law or of any law in force in British India.

By 22 & 23 Vict. c. 63, when an action is pending in any Court in Her Majesty's Dominions, the Court may, if it deems it material to ascertain the law in any other part of such Dominions, cause a case to be prepared and remit the case for the opinion of one of the superior Courts of such other part, praying for the opinion of the Court upon it: a certified opinion of such Court is given to each of the parties, and either of them may ask the first Court to apply it to the case. 24 Vict. c. 11 makes a similar provision in the case of any foreign State, with which Her Majesty is pleased to enter into a convention for the mutual ascertainment of the law of such State when pleaded in any Court in Her Majesty's dominions and of the law, as administered in any part of Her Majesty's dominions, when pleaded in the Courts of such foreign State. See Appendix.

(2) "**Science or Art**" must be taken to include any branch of learning, or any application of means to an end, which requires a course of previous habit or study in order to obtain a competent knowledge of its nature. The "expression," says Sir J. Stephen, "includes all subjects on which a course of special study or experience is necessary."

to the formation of an opinion.' Art. 19 would embrace special trades and professions; *e.g.*, commercial men may be called to explain particular expressions in a letter on a commercial subject. So, also, the genuineness of a postmark may be proved by the opinion of a Clerk of the Post Office: so, also, the opinion of military officers may be given on a question of military practice: of naturalists as to the power of fish to overcome obstacles in a stream: of engineers as to the effect of an embankment in choking up a harbour: of a person, whose business it had frequently been to estimate damages caused by the laying out of railways, as to the effect on the rental of a building of laying out a railway within a certain distance of it: of seal-engravers as to the question whether an impression was made from an original seal or an impression: of artists as to the genuineness of a picture: of antiquaries as to the date of ancient handwriting: of an engraver, who had been in the habit of examining minute lines on paper, as to whether a document contained originally certain pencil marks, which, it was alleged, had been rubbed out and writing substituted in their stead. It may sometimes be difficult to say whether a matter involves "a point of science or art," and, consequently, whether the opinions of experts upon it are relevant. There are conflicting decisions, for instance, in the English Courts, as to whether the opinion of brokers as to what is a material concealment in effecting a policy, or what is the duty of a broker under particular circumstances, can be regarded as the opinion of experts. The test, under the present section would seem to be whether the point to be decided involves special acquaintance with a particular subject, or whether it is a mere question of legal or moral obligation about which one person is as good a judge as another. Thus, a skilled witness may be asked whether by the rules of the Jockey Club a man may bet against his own horse and then withdraw him, that being a question of the science of racing: but he might not, it is apprehended, be asked his opinion as to the abstract morality of that proceeding.

In *Rowley v. London and North Western Railway Co.*, L. R., 8 Exch., 221, a question arose as to probable duration of certain person's lives and the price of an annuity, and the evidence of an "accountant," who was not an actuary, but who had personal acquaintance with the mode in which insurance business was conducted, was held to be admissible. He referred to certain tables named "Carlisle tables," and used by Insurance offices, as to duration of life and price of annuity. The argument turned on the question whether the 'knowledge' must be not only personal but professional. See also *Carter v. Boehm*, 1 Smith's L. C., 555, (7th edn.); *Sussex Peerage Case*, 11 Cl. & Fin., p. 85, at page 134, (overruling *Wightman, J.*, in *R. v. Dent*, 1 C. & K., 97,) and *Bristow v. Sequeville*, 5 Exch., 275.

With respect to the admissibility in evidence of the opinion of a medical man as to the state of mind of a prisoner when on his trial for an alleged offence, the following question was proposed to the English Judges by the House of Lords: "Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind, at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any, and what, delusion at the time?" To the question thus proposed, the majority of the Judges returned the following answer: "We think the medical man under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right;" *McNaghten's Case*, 10 Cl. & Fm., 200.

Under the present section the question might be thus put: "You have heard the symptoms said to have been exhibited by A: supposing a person to exhibit those symptoms, what would be your opinion of his mental condition?"

In English and American Courts a witness, who has had opportunities for observing the demeanor and habits of a person, whose sanity is in question, may be asked his opinion as to that person's sanity. The present Act does not provide for this; the witness could speak only as to the character of the demeanor or habits as indication of sanity or the reverse.

A person "specially skilled" means, it is submitted, any person who, from his circumstances and employment, possesses exceptional means of knowledge, has given the subject particular consideration, and is more than ordinarily conversant with its details. A clerk, for instance, whose business, amongst other things, it was to scrutinize the handwriting of different people and to detect points of resemblance or variety, might give an opinion on a question of handwriting, although his "special skill" was something short of that of a first-rate expert. If he has any "special skill," his opinion is relevant: the degree in which he possesses such skill, and the consequent value of his evidence is, of course, matter for comment, but the admissibility of his evidence does not depend upon it.

Comparison of handwriting.—By Section 73, in order to ascertain the genuineness of a signature, any proved signature "may be compared with the one which is to be proved;" it would be allowable, therefore, to put the documents into the hands of a competent witness and desire him to indicate the points of resemblance or variety: *Atton v. Russell*, 3 F. & F., 152; S. C., 9 Jur., (N.S.) 753.

By the English Common law it was not as a rule allowable to prove the handwriting of a party to a document by a comparison between it and others, proved or admitted to be his; but such comparison might be made if the documents, with which the disputed documents were to be compared, were already in evidence in the cause, *Low v. Pepp v. Newton*, 5 A. & E., 514, and proved or admitted to be in the handwriting of the supposed writer. In the same way, documents, proved to have been regularly kept, might be compared with a disputed ancient document.

In the *Pit. v. Walter Peverage* (case, 10 C. L. & Fin., 193), an Inspector of Franks at the Post office, who had great experience in handwriting, was called to prove the identity of the signer of a disputed document with the signer of several documents, the signature to which was undisputed. He had merely examined the documents and compared them since the commencement of the trial; his evidence was rejected. Similarly, in *Garnay v. Langlands*, 5 B. & Ald., 530, a Post Office Inspector of Franks was asked whether from his knowledge of handwriting he believed the handwriting in question to be genuine or a forgery; and his evidence was rejected by the Court. In *Doe d. Mudd v. Suchermore*, 5 A. & E., 703, at page 730, the question was as to the attestation of a will. The attestation of one witness was supposed to be a forgery, and it was proposed to give the evidence of an Inspector at the Bank, who professed to have great experience in handwriting, and stated that he had during the trial examined the documents, the signatures to which were undisputed, and by that means had acquired a knowledge of the writer's handwriting, and that this knowledge enabled him to speak to the genuineness of the disputed signature. This evidence was rejected in the original Court, and on appeal the Judges were divided in opinion. The doubt thus existing in the English Courts is removed by the present Act. As Section 73 allows a disputed signature to be compared with an undisputed one, and the present section allows the opinion of identity of handwriting to be given, the effect is to allow a disputed signature to be proved either

- (1) by a person acquainted with the handwriting of the supposed writer under Section 47, or
- (2) by the opinion of an expert comparing the disputed signature with an admitted one, Sections 47 and 73 or
- (3) by a comparison by the Court under Section 73.

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A person "specially skilled" means, it is submitted, any person who, from his circumstances and employment, possesses exceptional means of knowledge, has given the subject particular consideration, and is more than ordinarily conversant with its details. A clerk, for instance, whose business, amongst other things, it was to scrutinize the handwriting of different people and to detect points of resemblance or variety, might give an opinion on a question of handwriting, although his "special skill" was something short of that of a first-rate expert. If he has any "special skill," his opinion is relevant: the degree in which he possesses such skill, and the consequent value of his evidence is, of course, matter for comment, but the admissibility of his evidence does not depend upon it.

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- (1) by a person acquainted with the handwriting of the supposed writer under Section 47, or
- (2) by the opinion of an expert comparing the disputed signature with an admitted one, Sections 47 and 73 or
- (3) by a comparison by the Court under Section 73.

(3) **Opinions of experts.**—Of course, in one sense, all oral testimony as to things perceived by the senses is an expression of opinion, a statement of the impression made on the senses by the thing perceived; and when a witness does not qualify the statement of the fact by saying that he is stating his opinion about it, it is only because he feels very sure of his opinion:—"I saw A coming along: he was drunk: he was a quarter of a mile off: there were over a hundred people there" really means "I saw a person coming along as to whom the impression created on my senses was that it was A: his appearance and demeanour were those of a drunken person: the distance was in my opinion a quarter of a mile: I estimate the crowd at over 100." Directly a witness feels hesitation about the correctness of the impression produced on his senses or the inference drawn by his mind from that impression, he puts in such words as "to the best of my belief," i.e., "this is the impression left on my senses, but I will not swear that it may not have been wrong." It is not, of course, intended to exclude evidence of this description. The object of the present section is to obtain a skilled opinion as to the import of facts observed by another. The expert's opinion as to the evidence of the facts, about which his opinion is asked, is irrelevant, unless he perceived them himself. Thus an expert may be asked to compare two letters and say if the handwriting is identical; but he must not be asked as to what he infers from that identification. This is a matter of fact, and his inference must not be substituted for that of the Court, or the jury in cases where a jury is employed.

A medical man, who has seen a particular corpse and who is called to corroborate the opinion of a doctor who made the *post-mortem* examination and who has stated what he considered to be the cause of death, can give evidence of his opinion as an expert.

The proper mode of eliciting such opinion is to put the signs observed at the *post-mortem* to the witness and then ask him what in his opinion was the cause of death, on the hypothesis that those signs were really present and observed; *Queen-Empress v. Meher Ali Mullick*, 1. L. R., 15 Cal., 589.

Questions frequently arise as to the special meaning of particular words or expressions, as used by certain classes or in certain circumstances. Before, however, evidence on such a point can be given, it is necessary to lay a foundation for it by showing that there was something, in the facts of the case, to prevent the words used from having their ordinary meaning. In an action for slander, *Dutnes v. Hartley*, 3 Exch., 200, a witness deposed to the following words having been spoken by the defendant about some bills given by the plaintiff's firm—"You must look out sharp that those bills are met

by them.”—The plaintiff’s counsel proposed to ask “what did you understand by that?” The question was disallowed, and was considered by the Appellate Court to have been properly disallowed, Pollock, C. B., (page 205) observing, “There can be no doubt that words may be explained by bystanders to import something very different from their obvious meaning. The bystanders may perceive that what is uttered is uttered in an ironical sense, and, therefore, that it may mean the reverse of what, it professes to mean. Something may have previously passed which gives a peculiar character and meaning to some expression: and some word which ordinarily and popularly is used in one sense, may, from something which has gone before, be restricted and confined to a particular sense, or may mean something different from that which it ordinarily and usually does mean. But the proper course for a counsel, who proposes so to get rid of the plain and obvious meaning of words imputed to a defendant, as spoken of the plaintiff, is to ask the witness, not ‘what did you understand by those words?’ but, ‘was there anything to prevent those words from conveying the meaning which ordinarily they would convey?’ because, if there was, evidence of that may be given; and then the question may be put. When you have laid the foundation for it, then the question may be put. ‘What did you understand by them?’ when it appears that something occurred by which the witness understood the words in a sense different from their ordinary meaning. I believe we may say, that generally no question ought to be put in such a form as possibly to lead to an illegal answer. Now, taken by itself, and without more, the understanding of a person who hears an expression is not the legal mode by which it is to be explained. If words are uttered or printed, the ordinary sense of those words is to be taken to be the meaning of the speaker; but, no doubt, a foundation may be laid by showing something else which has occurred; some other matter may be introduced, and then, when that has been done, the witness may be asked, with reference to that other matter, what was the sense in which he understood the words. But the mere question ‘What did you understand with reference to such an expression?’ we think is not the correct mode of putting the question.”

As to scientific treatises, and the right of tendering passages from them in evidence, see note to Section 60.

As to the mode in which an expert’s opinion may be proved, see Section 60.

As to proof of the Examination of a Civil Surgeon or other medical witness and of the opinion of any Chemical Examiner to Government in Criminal Cases, see Cr. P. C., Act X, 1882, Sections 509 & 510 and Act X, 1886, § 14. A statement by a person styling himself “Addi-

tional 'Chemical Examiner' was held before Act X, 1886, not to be admissible under these sections; *Empress v. Autal Much.* I. L. R., 10 Cal., 1027.

Facts bearing
upon opinions
of experts

46. Facts, not otherwise relevant, are relevant if they support or are inconsistent with the opinions of experts, when such opinions are relevant.

Illustrations

(a) The question is, whether A was poisoned by a certain poison. The fact that other persons, who were poisoned by that poison, exhibited certain symptoms which experts affirm or deny to be the symptoms of that poison, is relevant

(b) The question is, whether an obstruction to a harbour is caused by a certain sea-wall

The fact that other harbours similarly situated in other respects, but where there were no such sea-walls, began to be obstructed at about the same time, is relevant

Opinion as to
hand writing.

47. When the Court has to form an opinion as to the persons by whom any document was written or signed, the opinion of any person acquainted with the handwriting of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation.—A person is said to be acquainted with the handwriting of another person when he has seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents, purporting to be written by that person have been habitually submitted to him.

Illustration

The question is, whether a given letter is in the handwriting of A, a merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A and received letters purporting to be written by him. C is B's clerk, whose duty it was to examine and file B's correspondence. D is B's broker, to whom B habitually submitted the letters purporting to be written by A for the purpose of advising with him thereon.

The opinions of B, C, and D on the question whether the letter is in the handwriting of A are relevant, though neither B, C, nor D ever saw A write.

Note.

Proof of handwriting.—There are, besides the direct testimony of the writer himself or of some person who saw him write the document in question, three ways of proving handwriting provided by the Act, *viz.*, by an expert under Section 45, by a person acquainted with it under the present section, and by comparison under Section 78.

48. When the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know if its existence if it existed, are relevant.

Opinions as to existence of right or custom, when relevant.

Explanation.—The expression 'general custom or right' includes customs or rights common to any considerable class of persons.

Illustration.

The right of the villagers of a particular village to use the water of a particular well is a general right within the meaning of this section.

Note.

Opinions as to a right or custom.—The opinions of persons, likely to know, about village rights to pasturage, to use of paths, water-courses, or ferries, to collect fuel, to use tanks and bathing ghâts, mercantile usage and local customs would be relevant under this section.

As to the effect of custom and the evidence necessary to prove it, see note to Section 13. As to the mode in which statements of opinion by a person who is dead, or, for some other reason, cannot be produced, see Section 82, Clause 4.

General custom or right.—It is obvious from the explanation that the distinction sometimes drawn between “public” and “general” customs and rights is not intended to be maintained. Every public right or custom is necessarily a general one.

Opinions as to usages, tenets, &c., when relevant.

49. When the Court has to form an opinion as to—

the usages and tenets of any body of men or family,

the constitution and government of any religious or charitable foundation, or

the meaning of words or terms used in particular districts or by particular classes of people,

the opinions of persons having special means of knowledge thereon, are relevant facts.

Note.

Opinions as to usages, tenets, &c.—By Section 98, evidence may be given with reference to a document, to show the meaning of ‘technical, local and provincial expressions, abbreviations and of words used in a peculiar sense.’ For this purpose the opinions of persons having special means of knowledge on the subject would be the best evidence.

Opinion on relationship when relevant.

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact :⁽¹⁾

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act, or in prosecutions under Sections 494, 495, 497, or 498 of the Indian Penal Code.⁽²⁾

Illustrations.

(a) The question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant.

(b) The question is whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant.

Note.

(1) **Opinions on relationship expressed by conduct.**—"Thus, in the *Berkeley Peerage Case*, 4 Camp., 416, Mansfield, C. J., remarked, 'if the father is proved to have brought up the party as his legitimate son, this amounts to a daily assertion that the son is legitimate.' "On the other hand the concealment of the birth of a child from the husband,—the subsequent treatment of such child by the person who, at the time of its conception, was living in a state of adultery with the mother,—and the fact that the child and its descendants assumed the name of the adulterer, and had never been recognized in the family as the legitimate offspring of the husband,—are all circumstances that will go far to rebut the presumption of legitimacy, which the law raises in favor of the issue of a married woman."—*Tayl.*, § 649. But considerations such as these could not overrule the conclusive presumption provided in Section 112 as to legitimacy.

So, also, where the question is whether a person was the son of a particular testator, the fact that all the members of the family appear to have been mentioned in the will but that no notice is taken of such person, would be evidence of the testator's opinion, expressed by conduct, as to such person's relationship, and would be admissible under this section.

In *R. v. Wazira*, 8 B. L. R., App., 63, it was held by the Bengal High Court that the mere fact of a man and woman living together as husband and wife would be sufficient, in a prosecution under Section 498 of the Indian Penal Code, to throw the burthen of proving that they were not so on the accused. Under the present section the burthen of proving a marriage is, in every such case, thrown on the prosecution.

As to the presumptions with reference to marriage and legitimacy, raised in the case of persons who have lived on the footing of husband and wife, and parent and child, see note to Section 114.

The rule laid down in this section appears to apply in English Law only to questions of marriage: but it is at least equally applicable to questions of legitimacy and relationship generally, including, of course, adoption. The conduct which indicates a person's opinion about a thing is allowed by this section to be evidence of the thing itself. A's behaviour to B, accordingly, indicates not only what A considered his relationship to B, but also what that relationship was.

(2) Where a marriage is an ingredient in an offence, as in adultery, bigamy and enticing away a married woman, it must be strictly proved; *Empress v. Pitambhur Singh*, 5 C. L. R., 597; I. L. R., 5 Cal., 566, and *Empress v. Kallu*, I. L. R., 5 All., 233.

Grounds of
opinion when
relevant.

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Illustration.

An expert may give an account of experiments performed by him for the purpose of forming his opinion

Note.

An important test of the value of the expert's evidence is thus provided. The Court is not left to the bare statement of an opinion, but can inquire into the grounds on which it is based, and thus ascertain whether there are any grounds or whether they are reasonably adequate. This section is to a great extent a repetition of Section 46.

CHARACTER WHEN RELEVANT.

In civil cases,
character to
prove conduct
imputed is
irrelevant.

52. In civil cases, the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant, except in so far as such character appears from facts otherwise relevant.

Note.

'Persons concerned,' means persons whose conduct is relevant to the suit. It does not include witnesses, as to whom provision is made in Sections 145, 146, 153 and 155 to regulate evidence given for the purpose of affecting their credibility.

There are of course many cases in which character is a fact in issue or relevant. For instance, in an action for libel if the libel consisted in attributing bad qualities to the plaintiff, and the defendant justified, the existence or non-existence of those qualities would be a fact in issue. "Character" as employed in these sections includes both reputation and disposition, Section 55. It must be distinguished from the "state of mind," to which reference is made in Section 14 and which, (see *Illustration k*) may be relevant in judging of the probability of conduct.

53. In criminal proceedings, the fact that the person accused is of a good character, is relevant.

In criminal cases, previous good character is relevant.

Note.

A man's character is often of the utmost importance in explaining his conduct and judging of its innocence or criminality. Many acts, which, standing alone, would be suspicious, are freed from all suspicion, when we come to know the circumstances and character of the person by whom they are done. Sir James Stephen gives, as an instance, the case of B being found in possession of A's watch, and stating, by way of explanation, that he found it and was keeping it to give to A. This value of this explanation would depend entirely on the character and position of the person who gave it. As it stands it is worth very little, but given by an intimate friend of A's and a man of respectable character, it would effectually dispel any suspicion of a guilty intention. We should, therefore, in criminal inquiries, be shutting out an important ingredient of belief, if we exclude evidence of character. Evidence of good character, accordingly, is always admissible: evidence of bad character is also admissible, but only in the cases and subject to the limitations provided in the next following section.

54. In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Previous conviction in criminal trials is relevant, but not previous bad character, except in reply.

Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2.—A previous conviction is relevant as evidence of bad character.—[*Act III of 1891, s. 6.*]⁽¹⁾

Note.

(1) As shown in the note to the last preceding section, the consideration of character may often be of the utmost importance in weighing the probabilities of the case. This is conspicuously true in cases where the question is as to the guilt of one of two or more persons. A child is found robbed, raped and brutally murdered. The circumstances are such that the crime must have been committed by one of two men: the first is a noted thief, of violent habits; the

second a person of refinement, wealth and benevolence ; the character of the latter renders it almost incredible that he should have committed the crime, and so strengthens the cases against the former. This is one of the instances in which Bentham considers that evidence of character is properly admissible in criminal cases.—*Benth. Rat., Evid., B. V., ch. xiii.* Important, however, as evidence of this nature may often be, it may easily be productive of hardship to the accused, since it is apt to lead the mind of the Judge or Jury away from the point to be decided, *viz.*, the guilt or innocence of the accused of the particular offence, with which he is charged. Where a prisoner is charged with an offence committed after a previous conviction as under Section 221 of the C. P. Code, the previous conviction is not put to him till he has pleaded guilty or been convicted: C. P. C., s. 310, and see Section 9 of Act III of 1891. As to proof of previous convictions, see Section 511 of C. P. C.

(2) This substitution was effected in consequence of the decision in *R. v. Kartick Chunder Dass*, I. L. R., 14 Cal., 721, that a previous conviction was in all cases admissible in evidence against the prisoner, which according to the report of a Committee of the Legislative Council was obviously what was intended by the Legislature. In a previous case, *Roshun Doosadh v. The Empress*, I. L. R., 5 Cal., 768, an attempt had been made to confine the operation of the section to cases in which the fact of a previous conviction increased the sentence to which the convicted prisoner was liable. See too *Reg. v. Parbhudas Ambaram*, 11 Bom. H. C. 90.

The English law accordingly regards the admission of evidence of bad character with disfavour and its provisions on the subject have practically been reproduced by Section 6 of Act III of 1891. This section was substituted for one which enacted that—"In criminal proceedings, the fact that the accused person has been previously convicted of any offence, is relevant; but the fact that he has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant. *Explanation.*—This section does not apply to cases in which the bad character of any person is itself a fact in issue."

This section is inapplicable where bad character is itself a fact in issue.—In proceedings under Chapter VIII, Section 107—118, of the Criminal Procedure Code, or under Act XXVII of 1871, (*Criminal Tribes*), the character of a person is a fact in issue, and, therefore, evidence as to it is relevant under Section 5: the present section, accordingly, has no application in such a case.

As to proof of bad character of accusers, see § 155. "Impeaching credit of witnesses."

55. In civil cases, the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.⁽¹⁾

Character as affecting damages.

Explanation.—In Sections 52, 53, 54 and 55, the word ‘character’ includes both reputation and disposition;⁽²⁾ but evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.⁽³⁾

Note.

(1) **Character as affecting damages**, see notes to Section 12. In an action by a father for seduction of his daughter, the previous character of the daughter will be relevant; and in a petition for dissolution of marriage and for damages against a co-respondent the husband may give evidence of the terms of affection on which he lived with the respondent; and the co-respondent may give evidence of cruelty, &c., which would tend to disentitle the husband to damages; see Act IV of 1869, Section 84. In actions of breach of promise of marriage the defendant may “prove in mitigation of damages, that the plaintiff is a person, either of bad character. or of coarse and brutal manners,” *Tayl.*, § 358; or that she is destitute of feeling, or that her conduct before or since the breach shows that it has not affected her much; *Leeds v. Cook*, 4 Esp., 256. In *England v. Blake Odgers (Law of Libel and Slander*, p. 366, Third Ed.) lays down that in actions for libel or slander “the fact that the plaintiff had a general bad character before the date of the libel or slander may be given in evidence in mitigation of damages. But the defendant may not go into particular instances, still less may he prove the existence of a general report that the plaintiff had actually committed the particular offence of which the defendant accused him, or any similar offence.” See *Scott v. Sampson*, 8 Q. B. D., 491; *Wood v. Earl of Durham*, 21 Q. B. D., 501 and see *Taylor*, §§ 359, 360. See to R. S. C. Ord. XXXVI, v. 37, as to when a defendant who does not assert the truth of the statement complained of may give evidence in chief as to the plaintiff’s character. This section makes evidence as to character admissible so far as it relates to the general reputation and disposition of the defendant.

(2) **‘Character’ includes reputation and disposition.**—This clears up a point as to which there has been a difference of opinion between

English Judges, *viz.*, whether evidence of "character" extends to disposition as well as to reputation. The more comprehensive meaning given to the word 'character' in this section is, no doubt, the right one, when character is regarded as a ground for inference.

(3) **Evidence of general character and disposition alone receivable.**—According to English law, where damages are claimed by a husband on the ground of his wife's adultery, or by a father on account of his daughter's seduction, in order to show the previous character of the wife or daughter, "not only is evidence of general bad character admissible in mitigation of damages, but even particular acts of immorality or indecorum may be proved."—*Tayl.*, § 356. Evidence as to particular acts would be inadmissible under the present Explanation.

PART II. ON PROOF.

CHAPTER III.

FACTS WHICH NEED NOT BE PROVED

56. No fact of which the Court will take judicial notice need be proved.

No evidence required of fact judicially noticed.

57. The Court shall take judicial notice of the following facts :—

Facts of which Court must take judicial notice.

(1) All laws or rules having the force of law now or heretofore in force or hereafter to be in force in any part of British India.

(2) All public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed :⁽¹⁾

(3) Articles of War for Her Majesty's Army or Navy :

(4) The course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established under the Indian Councils Act, or any other law for the time being relating thereto.

Explanation.—The word 'Parliament,' in Clauses (2) and (4), includes—

1. The Parliament of the United Kingdom of Great Britain and Ireland ;

2. The Parliament of Great Britain ;
3. The Parliament of England ;
4. The Parliament of Scotland ; and
5. The Parliament of Ireland.

(5) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland :

(6) All seals of which English Courts take judicial notice :⁽²⁾ the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor-General or any Local Government in Council : the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries public, and all seals which any person is authorized to use by any Act of Parliament or other Act or Regulation having the force of law in British India :

(7) The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any part of British India, if the fact of their appointment of such office is notified in the *Gazette of India*, or in the official Gazette of any Local Government :

(8) The existence, title, and national flag of every State or Sovereign recognized by the British Crown :⁽³⁾

(9) The divisions of time, the geographical divisions of the world, and public festivals, fasts, and holidays notified in the Official Gazette :

(10) The territories under the dominion of the British Crown ;⁽⁴⁾

(11) The commencement, continuance, and termination of hostilities between the British Crown and any other State or body of persons :⁽⁵⁾

(12) The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attornies, proctors, vakils, pleaders, and other persons authorized by law to appear or act before it :

(13) The rule of the road on land or at sea.⁽⁶⁾

In all these cases, and also on all matters of public history, literature, science, or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so, unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

Note.

(1) **Public Act.**—By 52 & 63 Vic. c. 63, Section 9, it is provided that every Act made after 4th February 1851 shall be deemed to be a public Act, and shall be judicially taken notice of as such unless the contrary be expressly provided in such Act.

(2) **Seals of which English Courts take judicial notice.**—For a list of seals of which English Courts take judicial notice, see Taylor, Sec. 6: the list includes the Great Seal of the United Kingdom, the Queen's Privy Seal, the seals of the Supreme Court, and its several Divisions, of the old Court of Admiralty, and the seals of all Courts constituted by Act of Parliament if seals are given to them by the Act. They also notice judicially the seal of the City of London. The seal of a foreign or colonial notary-public is not generally judicially noticed.

Under this section the Court will take judicial notice of a power of attorney which has been registered with the proper officer; *Kiste Nath Koondoo and others v. T. F. Brown and others*; I. L. R., 14

Cal., 176. The Court, however, can go behind a certificate of registration where it finds that a document was registered by an officer who had no jurisdiction, and will refuse to receive it in evidence on the ground that it was not duly registered; *Mitter v. Mondul*, L. L. R., 14 Cal., 449. See Section 85.

(3) **Recognition of Independent State.**—Where there is a Civil war and one part of a nation establishes itself as an independent Government, the Judges are bound ex-officio to know whether or not the Government has recognized such part as an Independent State.—*Tayl.*, § 4.

By Section 431 of the C. P. C. it is provided that the Court shall take judicial notice of the fact that a foreign State has not been recognized by Her Majesty or by the Governor-General in Council.

(4) **British Territories.**—By 53 & 54 Vict. c. 37, s. 4 (*Foreign Jurisdiction*), Section 3, if in any Court in Her Majesty's Dominions a question arise as to the jurisdiction of the Crown in any place out of Her Majesty's Dominions, the Court may transmit questions as to the subject to one of Her Majesty's principal Secretaries of State, and the answer returned will be final and conclusive evidence of the matters therein contained.

(5) **Commencement of hostilities.**—As to what is sufficient evidence of a commencement of hostilities, see the remarks of the Judicial Committee in "*The Teutonia*;" L. R., 4 P. C., 171, at page 178.

(6) **Rule of the road.**—These words were added by Act XVIII of 1872. The addition, however, appears to be of questionable propriety, inasmuch as "the regulations for preventing collisions at sea," which contain the rules concerning lights, fog-signals, steering and sailing are now embodied in a table issued by virtue of 57 & 58 Vict. c. 60, s. 418 and various subsequent orders in council.—See *Tayl.*, § 5.

Facts admitted.

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands,⁽¹⁾ or which by any rule of pleading⁽²⁾ in force at the time they are deemed to have admitted by their pleadings :

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.

Note.

(1) **Facts admitted by agreement need not be proved.**—There is no provision in the Indian Law of Procedure, as in England, for enabling one party in a suit to call upon the other to admit a fact, other than the genuineness of a document, and in the event of the other party not doing so, to throw upon him the expense of the proof. Some such provision would be an useful addition to the Code of Civil Procedure, and a clause to this effect was proposed when the Code of 1877 was drafted. It was however probably considered too much in advance of the general intelligence: and Section 117 of the Code now provides that at the first hearing the Court shall ascertain from the parties what facts they respectively admit or deny. As to the power to demand admission of the genuineness of a document and the effect of non-compliance, see Civ. P. C., Act XIV, 1882, Section 128.

As to the effect of an admission in a suit by a duly authorized agent, see *ante*, Section 18, note (1).

Under the English law a prisoner under trial for felony can make no admissions so as to dispense with proof, though a confession may be proved against him; *Steph. Dig.*, Art. 60. The present section appears to allow of an accused admitting at the trial such facts as he pleases to admit.

(2) **Facts admitted in pleadings need not be proved.**—English rules of pleading were formerly so strict that the omission to contradict a fact at the right moment was often tantamount to an admission of it. This strictness has, however, now been considerably modified and has always been foreign to Indian procedure. Some pleas are, from their very nature, an admission of certain facts; *e.g.*, a plea of payment of a debt necessarily admits the fact of there having been a debt: a plea of cancelment of a bond admits its execution: a plea of tender of rent to a landlord admits the fact of a tenancy. This, however, is not the result of any "rule of pleading," but of the necessary logical import of the expressions used. In *Rainy v. Bravo*, L. R., 4 P. C., 287, in a suit for libel, before the declaration was filed, the plaintiff gave notice of his intention to move for a rule for the production of the letter containing the words of the libel as set out in the declaration. An affidavit in answer by the defendant stated that he, the defendant, had destroyed the letter, but made no objection to the terms of the alleged libel set out in the plaintiff's affidavit. It was held that the defendant's affidavit, being merely for the purpose of the production of the letter, was not admissible as evidence to prove the words of the libel.

CHAPTER IV.

OF ORAL EVIDENCE.

Proof of facts
by oral evi-
dence.

59. All facts, except the contents of documents, may be proved by oral evidence.

Oral evidence
must be di-
rect.

60. Oral evidence must, in all cases whatever, be direct; That is to say—

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds;

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatises if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable;

Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

Note.

Circumstantial evidence is not excluded.—This section has been misunderstood as rendering it doubtful whether, since every visible fact must be proved by some one who saw it, circumstantial evidence is not altogether excluded; *Neel Kanto Pandit v. Juggobundoo Ghose*, 12 B. L. R., App., 18. It is scarcely necessary to observe that no such absurd result can have been intended by the Legislature or can indeed be reasonably understood from its language, read with the rest of the Act. A thing is said to be “proved,” (Section 2) when the Court, after considering all the evidence before it, either believes it to exist or considers the probability of its existence so strong that a prudent man would act upon it: chapter two gives a group of facts, among which the evidence, which is the ground for this inference, must be shown to fall: and the present sections show how each of these facts must be proved. The misapprehension appears to have arisen from a confusion between the particular facts, which are the ground of the inference, and the inference itself.

Cross-Examination.—As to what questions may be asked on cross-examination, see Section 146; it seems that there is no rule or law which renders hearsay more admissible in cross-examination than in examination in chief; *Ganouri Lulu Das v. Queen-Empress*, I. L. R., 16 Cal., 206.

Commissions to take evidence.—The oral evidence need not, in all cases, be given before the Court itself. As to commissions to take evidence in civil cases, see Civil Procedure Code, Act XIV, 1882, chapter 25; and in Criminal cases, Criminal Procedure Code, Act X, 1882, Section 330.

Opinions of experts expressed in treatises.—The obligation of the Court to allow passages to be read from treatises is, since the passing of the Act, unquestionable, provided (1) that the opinion is that of an expert, (2) that the treatise be one commonly offered for sale; and (3) that the writer cannot be produced without unreasonable delay or expense.

Scientific Treatises.—The Court ought to allow passages from well-known scientific works, such, for instance, as Taylor's Medical Jurisprudence, to be read before it; *Hurry Churn Chuckerbutty v. The Empress*, I. L. R., 10 Cal., 143.

Objections to documents.—If objection is raised to a document, on its production before a commission, any other objection to it may be raised on its being tendered at the trial; *Ralli v. Gan Kim Swee*, I. L. R., 9 Cal., 989. But a party may, by not objecting to secondary evidence, when tendered before a commission, preclude himself from

afterwards objecting. Secondary evidence, admitted *at nisi prius* without objection, cannot be afterwards objected to; Lush, J., in *Robinson v. Davies*, L. R., 5 Q. B. D., 26. But illegal evidence taken before a commission may be struck out, though no objection was made; *Hutchinson v. Bernard*, 2 Moo. & Rob., 1; *Lumley v. Gye*, 3 E. & B., 114.

CHAPTER V.

OF DOCUMENTARY EVIDENCE.

Proof of
contents of
document.

61. The contents of documents may be proved either by primary or by secondary evidence.

Note.

Stamp and Registration Acts unaffected.—This section does not, of course, over-ride the laws as to stamps and Registration. As to cases in which registration of documents is compulsory, see Act III of 1877, Section 17; and as to those in which it is optional, Section 18.

A document, which, owing to non-registration, would be inadmissible, may, if its provisions are distinct and separable, and some of those provisions contain a mere personal obligation, be used as evidence of the personal obligation, for which registration was unnecessary. Thus an unregistered bond, containing a personal undertaking to repay money borrowed, and also a hypothecation of land above Rs. 100 in value as security, may be used as evidence to enforce the personal obligation; *Alfuttennessa v. Hosain Khan Kabuli*, 12 C. L. R., 209. So also *Gour Churn Surma v. Jinnat Ali*, 11 C. L. R., 166.

Primary Evidence.—The rule that documents may be proved by primary evidence must be read subject to the provision in Section 68 as to attesting witnesses.

Primary
evidence.

62. Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document:

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original.

Illustration.

A person is shown to have been in possession of a number of placards all printed at one time from one original. Any one of the placards, is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.

Note.

Admission of contents of document.—According to English law an admission of the contents of a document is held, on the authority of *Slatterie v. Pooley*, 6 M. & W., 664, to be primary evidence of those contents. Under Section 22 of the present Act, oral admissions of the contents of a document are irrelevant until the right to use secondary evidence is established. By Section 58 the necessity of proving a document may be obviated by the parties agreeing at the hearing, or, in writing, before the hearing, to admit its execution or contents. Provision is made in Section 128 of the Code of Civil Procedure of 1882 for admissions of the genuineness of a document. By Section 70 of this Act an admission of execution by a party to an instrument is sufficient proof of execution, as against him, although the instrument be one which by law requires attestation.

Effect of alteration of document after execution.—A fraudulent or unauthorized alteration of a document will render it wholly invalid. "The general rule of law," says Mr. Taylor, is, that any material alteration in a written instrument, whether made by a party or a stranger, if made after its execution, and without the privity of the party to be effected by it, is fatal to its validity. Perhaps it is further necessary that the alteration be made while the instrument was in the possession, or at least under the control, of the party seeking to enforce it. This rule was originally propounded with respect to deeds, probably because in former days most written engagements were drawn in that form. It has since been extended to negotiable securities, bought and sold notes, guarantees, and policies of assurance; and may now be said to apply equally

to all written instruments, which constitute the evidence of contracts.”—*Tayl.*, § 1820. Any alteration is, of course, suspicious and raises a presumption of fraud. On this point the Privy Council observed in *Mussamut Khoob Conwur v. Baboo Moodnara Singh*, 9 Moore’s J. A., 1, at page 17. “It may be conceded that, in an ordinary case, the party who presents an instrument, which is an essential part of his case, in an apparently altered and suspicious state, must fail, from the mere infirmity or doubtful complexion of his proof, unless he can satisfactorily explain the existing state of the document. But this wholesome rule admits of exceptions, if there be, independently of the instrument, corroborative proof strong enough to rebut the presumption which arises against an apparent and presumable falsifier of evidence. And such corroborative proof will be greatly strengthened, if there be reason to suppose that the opposite party has withheld evidence which would prove the original condition and import of the suspected document.” But an immaterial alteration, even by a party to the instrument, does not invalidate it; *Aldous v. Cornwell*, L. R., 3 Q. B., 578.

- Secondary
evidence.

63. Secondary evidence means and includes—

(1) Certified copies given under the provisions hereinafter contained; ⁽¹⁾

(2) Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;

(3) Copies made from or compared with the original; (see *Ram Prasad v. Raghunandan Prasad*, I. L. R., 7 All., 738.)

(4) Counterparts of documents as against the parties who did not execute them;

(5) Oral accounts of the contents of a document given by some person who has himself seen it. ⁽²⁾

Illustrations

(a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.

(b) A copy compared with a copy of a letter made by a copying-machine is secondary evidence of the contents of the

letter, if it is shown that the copy made by the copying-machine was made from the original.

(c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence: but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original is secondary evidence of the original.

Note.

(1) **Certified Copies.**—See Sections 76 and 77 as to certified copies.

(2) **There are no degrees of secondary evidence:** when once secondary evidence is admissible, the law makes no distinction between one class of secondary evidence and another; though the fact that a party, who gives oral evidence of the contents of a document, is shown to have better secondary evidence of it, as, for instance, a compared copy of the original, might be ground for an adverse inference as to the good faith of the party so acting. There are, however, in Section 65, certain specific directions as to the kind of secondary evidence to be used in proving particular documents.

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Proof of documents by primary evidence

65. Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—

Cases in which secondary evidence relating to documents may be given.

(a) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or

of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,⁽¹⁾

and when, after the notice mentioned in section 66, such person does not produce it,⁽²⁾

(*b*) When the existence, condition, or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;⁽³⁾

(*c*) When the original has been destroyed or lost,⁽⁴⁾ or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(*d*) When the original is of such a nature as not to be easily moveable;

(*e*) When the original is a public document within the meaning of Section 74;

(*f*) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India, to be given in evidence;

(*g*) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.⁽⁵⁾

In cases (*a*), (*c*), and (*d*), any secondary evidence of the contents of the document is admissible.

In case (*b*), the written admission is admissible.

In case (*e*) or (*f*), a certified copy of the document, but no other kind of secondary evidence, is admissible.⁽⁶⁾

In case (*g*), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.

Note.

In order that secondary evidence of a document may be given, it is essential that the non-production of the original must first be accounted for so as to bring it within one or other of the above cases; *Krishna Kishoria Chaudhrani v. Kishoria Lal Roy*, I. L. R., 14 Cal. 486; L. R. 14 I. A. 71.

(1) **Documents which witnesses are not bound to produce:** see Sections 180 and 181. A witness may in addition to those cases refuse to produce documents on which he has a lien. As to the general lien of Bankers, Factors, Attorneys and others on goods bailed to them, see Contract Act, 1872, Section 171; and notes to Section 180 of this Act. The result of (a) is that, if the document is in the hands of a person who has a right to retain it, secondary evidence of its contents cannot be given.

(2) **Notice to produce.**—Where a party has notice to produce a particular instrument which has been traced to his possession, he cannot, it seems, object to parol evidence of its contents being given on the ground that, previously to the notice, he had ceased to have any control over it, unless he has stated this fact to the opposite party, and has pointed out to him the person to whom he delivered it (*Sinclair v. Stevenson*, I. C. & P., 585, *per* Best, C. J.). Neither can he escape the effect of the notice, by afterwards voluntarily parting with the instrument, which it directs him to produce; *Knight v. Martin*, Gow R., 104, *per* Dallas, J.—*Tayl.*, § 440.

Secondary evidence in action of libel must give the actual words.—In *Rainy v. Bravo*, L. R., 4 P. C., 287, the defendant, after the publication of a libel and before the action was brought destroyed the letter containing the libellous words. It was held, that, as the defamatory writing was not in existence, secondary evidence of the contents of the letter by witnesses, who heard it read, was admissible; but that the actual words used, as laid in the declaration, must be proved, and not the substance, or the impression which the witnesses received of the words, as otherwise the witnesses and not the Court or Jury would be made the Judges of what was a libel.

(3) **Written admission of contents of a document.**—Section 22 provides, contrary to the English law, that an *oral* admission of the contents of a document is inadmissible, until the person, proposing to give it, shows that he is entitled to use secondary evidence; the present clause provides that a *written* admission is admissible as proof of a document even though the original is in existence, and might be, but is not, produced.

(4) **Proof of loss.**—In order to prove a thing “lost” evidence must be given that it has been looked for:

"What degree of diligence is necessary in a search for a lost instrument cannot easily be defined, as each case must depend on its own peculiar circumstances. The party seeking to be allowed to give secondary evidence on the ground that an instrument is lost, is however is generally expected to show, that he has, in good faith, exhausted in a reasonable degree all the sources of information and means of discovery, which the nature of the case would naturally suggest and which were accessible to him." *Tayl.* § 429: but this is a matter to be decided by a Judge of the first instance. *Haripriya Debi v. Ruhmini Debi*, I. L. R., 19 Cal., 438.

"If an instrument ought to have been deposited in a public office, or other particular place, it will generally be deemed sufficient to have searched that place, without calling the party whose duty it was to have put it there, or any other person who may have had access to it."—*Tayl.* § 431.

Nor need the search have been recent, or for the purpose of the particular suit, provided the Court be satisfied that thorough search was made.

But distinct evidence of the destruction, or loss, and of reasonable search must be given. When a plaintiff alleged that a document had been partially destroyed by rats, and put in a registered copy of a deed together with certain fragments which he alleged to be the fragments of the deed, but offered no evidence of this being so, the Privy Council rejected the secondary evidence; *Syud Abbas Ali Khan v. Yudeem Ramy Reddy*, 3 M. I. A., 156.

For a case in which the Privy Council excluded secondary evidence of a document on the ground that its non-production was not accounted for see *Bhubaneswari Debi v. Harisaran Surma Moitra*, I. L. R., 6 Cal., 720.

For a case in which the Privy Council allowed a respondent to give secondary evidence of a document which the Court below had found had passed into the hands of the appellant see *Luchman Sing v. Puna*, I. L. R., 16 Cal., 753.

"If the instrument were executed in duplicate, or triplicate, &c., the loss of all the parts must be proved, in order to let in secondary evidence of the contents; and, in every case, before such evidence will be admissible, the original instrument must be shown to have been duly executed, and to have been otherwise genuine. If the instrument were of such a nature as to have required attestation, the attesting witness must, if known, be called, or in the event of his death, his handwriting must be proved, precisely in the same manner as if the deed itself had been produced; though, if it cannot be discovered who the attesting witness was, this strictness of proof

will, from necessity, be waived. In the absence of evidence to the contrary, the Court will presume that the instrument was duly stamped."—*Tayl.*, § 435.

As to proof of attestation, see *post*, Sections 68 and 69.

Limitation Act.—Section 29 of the Limitation Act, 1877 provides that oral evidence of the contents of a document containing an acknowledgment of liability in respect of any property or right shall not be given for the purpose of taking the case out of the operation of the Limitation Act, 1877, but oral evidence may be given of the time when it was signed. See Act XV of 1877, Sec. 19.

(5) "**Result.**"—The word "result" must be construed strictly to mean the actual figures or facts arrived at, not the general effect on a person's mind. "This exception" however, says Mr. Taylor, "speaking of the English rule on the subject, "will not enable a witness to state the general contents of a number of letters received by him from one of the parties in the cause, though such letters have since been destroyed, if the object of the examination be to elicit from the witness not a fact but merely an opinion or impression: for instance, the impression which the destroyed letters produced on his mind, with reference to the degree of friendship subsisting between the writer and a third party."—*Tayl.*, § 462.

(6) This provision applies only when the public document is still in existence on the public records. If it has been destroyed or lost, the ordinary rule, that secondary evidence is admissible to prove the contents of a lost or destroyed document, will apply; *Kuneth Odangat Kalandan v. Vayoth Pulleyil Kunhunni*, I. L. R., 6 Mad., 80.

66. Secondary evidence of the contents of the documents referred to in section sixty-five, clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, [or to his attorney or pleader] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:—[*Act XVIII of 1872, s. 6.*]

Rules as to
notice to
produce.

Provided that such notice shall not be required in order to render secondary evidence admissible in any

of the following cases, or in any other case in which the Court thinks fit to dispense with it:—

(1) When the document to be proved is itself a notice ;

(2) When, from the nature of the case, the adverse party must know that he will be required to produce it ;

(3) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force ;

(4) When the adverse party or his agent has the original in Court ;

(5) When the adverse party or his agent has admitted the loss of the document ;

(6) When the person in possession of the document is out of reach of, or not subject to, the process of the Court.

Note.

Notice to produce.—This section must be read subject to the following provisions of the Code of Civil Procedure, 1882. Section 59 requires the plaintiff to produce the document sued on when the plaint is presented, and a list of other documents in his possession. Where any material documents are not in his possession, he must, under Section 60, if possible, state in whose possession or power they are. The penalty for non-compliance with these sections is, according to Section 63, that documents, not produced or entered, shall not, without the leave of the Court, be received in evidence on plaintiff's behalf.

The summons to the defendant shall order the defendant to produce any document in his possession or power, containing evidence relating to the merits of the plaintiff's case, or upon which the defendant intends to rely in support of his case. (Section 70.)

As to Discovery, Admission, Inspection, Production, Impounding, and Return of Documents, see Chapter 10 of Civil Procedure Code, 1882. The summons is to be filled in with a description of the documents required by the plaintiff, and the notice to produce documents

for inspection must describe the documents referred to in the plaint, written-statement or affidavit, which the party serving the notice may require.

The summons should describe the required documents "with all convenient certainty." "It is difficult to lay down any general rule as to what a notice ought to contain, since much must depend on the particular circumstances of each case. No misstatement or inaccuracy in the notice will however be deemed material, if not really calculated to mislead the opponent. Neither is it necessary, by condescending minutely to dates, contents, parties, &c., to specify the precise documents intended..... If enough is stated on the notice to induce the party to believe that a particular instrument will be called for, this will be sufficient." "But a notice to produce 'all letters, papers and documents, touching or concerning the bill of exchange mentioned in the declaration and the debt sought to be recovered' has been held too vague to admit secondary proof of a notice of dishonour sent by the plaintiff to the defendant" and a notice to one of four defendants, whom it was sought to prove to be a part owner by means of a letter written by him nine years before to the son of another defendant, "to produce letters and copies of letters and all books relating to the cause" was held to be too uncertain to permit of secondary evidence being given. *Tayl.*, § 448. As far as English law is concerned however, reference must be made to R. S. C. O., XXXII R. 3, etc.

In Criminal cases the best course would appear to be to apply for a summons under Sections 94 and 95 of the Criminal Procedure Code, 1882, but any reasonable notice would, apparently, be sufficient to let in secondary evidence.

'By statute every seaman may bring forward evidence to prove the contents of his agreement with the master of the ship, or otherwise to support his case, without producing or giving notice to produce, the agreement itself or any copy of it. The reason for this indulgence is the proverbial inexperience and recklessness of sea-faring men.' *Tayl.*, §§ 319, 57 & 58 Vict c. 60, s. 123.

In *Ralli v. Gau Kim Swee*, I. L. R., 9 Cal., 937, it was held that, when a commission is taking evidence in a place beyond the jurisdiction of the Court, it is not necessary for the party, tendering secondary evidence of the contents of a document, to show that he has given notice to produce the original, or that there has been a refusal to produce the original.

Court may dispense with notice.—It will be observed that under this section, besides the specified cases in which notice is not required, the Court has the power of dispensing with the notice "in any case in which it thinks fit." This is a relaxation of the procedure in force in the English Courts.

Proof of signature & handwriting of person alleged to have signed or written document produced

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that persons' handwriting must be proved to be in his handwriting.

Note.

Proof of signature or handwriting.—This is not intended to prevent proof of a document in other ways, as, *e.g.*, by admission before a Kazi. In *Neel Kanto Pandit v. Juggobundhoo Ghose*, 12 B. L. R., App., 18, Markby, J., observed as follows: "It appears that in this case the evidence which was given in support of the document, upon which the defendant's case depends, was that of a Kazi, before whom the vendor came and admitted the deed to be his, and caused it to be registered, bringing witnesses to his execution thereof, and in fact going pretty much through the same forms as are now in force under the Registration Act. Upon that evidence the lower Appellate Court very naturally came to the conclusion that the deed was proved, and the only question which we have to consider is, whether the Court was precluded from doing so by Section 67 of the Evidence Act. Now it is contended that that section renders it necessary that direct evidence of the handwriting of the person who is alleged to have executed the deed must be given by some person who saw the signature affixed. But that is not so expressly stated in the section, and it does not appear to me that that was the intention of the Legislature. It seems to me that that section merely states with reference to deeds, what is the universal rule in all cases, that the person who makes an allegation must prove it. It lays down no new rule whatever as to the kind of proof which must be given. In that respect the rule is precisely the same as it stood before. It leaves it, as before, entirely to the discretion of the presiding Judge of fact to determine what satisfies him that the document is a genuine one."

As to the presumption in the case of a document purporting or proved to be thirty years old and produced from proper custody, see Section 90.

As to the mode of proof of handwriting, see Sections 45, 47 & 78.

Proof of execution of document required by law to be attested.

68. If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an

attesting witness alive, and subject to the process of the Court and capable of giving evidence.

Note.

Presumption in case of documents 30 years old.—An important exception to the rule here laid down is provided by English law in the presumption of the authenticity of the signatures to a document 30 years old produced from proper custody. The same presumption is provided by Section 90 of the Act, and would, no doubt, be understood as modifying the requirements of this section as to proof of attestation in the case of such documents.

Documents lost, cancelled, or admitted.—The rule laid down by the present section applies, under the English law, to cases in which the document in question has been burnt or cancelled, and even when the person who executed the document is prepared to admit its execution by himself, or can be shown to have admitted its execution; *Steph. Dig., Art.*, 66. The rule as to admissions is otherwise under the present Act, see Section 70.

Wills.—One important class of documents, required by law to be attested, is that of wills under the Indian Succession Act, Section 50, extended by Act XXI of 1870 to the wills of Hindus, Jains, Sikhs and Buddhists in the Presidency Towns and Lower Bengal.

The attestation, required by Section 50 of the Indian Succession Act, is not satisfied by the witnesses affixing their mark. It is necessary that they should *sign*; *Nitye Gopal Sircar v. Najendra Nath Mitter*, I. L. R., 11 Cal., 429.

The Transfer of Property Act, 1882, also requires attestation in the case of all mortgages, leases, gifts and other transfers of immoveable property, in which a document is required.

Merchant Shipping Act unaffected.—The Merchant Shipping Act, 57 & 58 Vic. c. 60, s 694, declares that any document, required by the Act to be executed in the presence of, or to be attested by, any witness or witnesses, may be proved by the evidence of any person who is able to bear witness to the requisite facts, without calling the attesting witness or witnesses or any of them.

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person

Proof where
no attesting
witness found.

executing the document is in the handwriting of that person.

Admission of execution by party to attested document.

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Note.

Admission of execution by party to document sufficient proof against himself. The provisions of the present Act as to admissions referring to documents are precisely the opposite of the English rule on the subject. In England an oral admission of the contents of a document may be proved, (see note to s. 22), but not in India except in the cases specially named. On the other hand the English cases lay down that a party cannot, except where the admission is made for the purpose of a cause in Court, admit the execution of a deed, which requires attestation, so as to dispense with proof of it by the attesting witness. "The rule *omnia præsumentur rite esse acta*, was here reversed," says Mr. Best, § 527, "the Courts holding that, although a party admitted the execution of a deed, the attesting witnesses might be acquainted with circumstances relative to its execution, which were unknown to the party making the admission and which might have the effect of invalidating the deed altogether." *Call v. Dunning*, 4 East., 58. Under the present section the party's admission is sufficient proof as against himself.

Proof when attesting witness denies the execution.

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Proof of document not required by law to be attested.

72. An attested document not required by law to be attested may be proved as if it was unattested.

Comparison of handwritings.

73. In order to ascertain whether a signature, writing, or seal is that of the person by whom it purports to have been written or made, any signature, writing, or seal admitted or proved to the satisfaction of the Court to have been written or made by that person may be compared with the one which is to be proved, although that signature,

writing, or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

Note.

Comparison of handwriting in disputed document with that in undisputed or proved document.—Sections 45 and 47 have already made provision for the proof of handwriting by the evidence of experts or of persons acquainted with the handwriting in question. The present section confers a power, which was not allowed under the English Common law, [the *Fitzwalter Peerage Case*. 10 Cl. & F., 193; *Doe d. Mudd v. Suckermore*, 5 A. & E., 708.] viz., of proving handwriting, signature or seal by comparing it with some specimen, as to the authenticity of which the Court is satisfied. The English law however, admitted a comparison between the disputed document and any document which was already in evidence and admitted or proved to be in the handwriting of the supposed writer; (*Griffith v. Williams*, 1. C. & J., 47. Ancient documents also, whose age rendered it impossible that any living person should speak to the handwriting contained in them, were allowed to be compared with other ancient documents, proved to be treated and preserved as authentic. The old rule of the English Law was modified in Civil cases by Section 27 of the common law procedure Act, 1854. (17 & 18 Vic. c. 125) which provided that comparison may be made between a disputed writing and any writing proved to the satisfaction of the Judge to be genuine: and that such writing may be submitted to the jury as evidence of the genuineness of the writing in dispute. A similar change was made as to criminal trials by 28 & 29, Vic. c. 18, s. 8.

PUBLIC DOCUMENTS.

74. The following documents are public documents :—

Public documents.

1. Documents forming the Acts, or records of the Acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial, and executive, whether of British India or of any other part of Her Majesty's dominions, or of a foreign country.

2. Public records kept in British India of private documents.

Note.

A Board of trade certificate, of which a duplicate is kept by the Registrar-General of Seamen, is not a public document within the meaning of this section. Where such a certificate was lost, and evidence was tendered that it was a Master's Certificate of a particular number and issued at Liverpool; it was held that the case was met by clauses (a), (c) and (f) of Section 65 of the Indian Evidence Act; that, although under clause (f) only a certified copy was admissible, the subsequent words, "In cases (a), (c) and (d) any secondary evidence is admissible," were too clear and strong to be controlled by anything that followed, and that, accordingly, the evidence tendered was admissible. It was held, further, in the same case, that the evidence of the number of the certificate, and of the fact that it was a seaman's certificate, was sufficient for the purpose of an investigation under Section 5 of Act IV of 1875; in the matter of a collision between the "Ava" and the "Brenhilda," I. L. R., 5 Cal., 568.

It is open to doubt whether a settlement Jumnaundi is or is not a 'public document'; *Ramchunder Sao v. Bunseedhur Naik*, I. L. R., 9 Cal., 741; *Akshaya Kumar Dutt Shama Charan Patilanda*, I. L. R., 16 Cal., 586.

An Anumatipatra is not a "public document" within the meaning of this section, and if it were, its being on the record is not the same thing as a certificate or certified copy as required by § 76, *post*; *Krishna Kishori Chandrani v. Kishoria Lal Roy*, I. L. R., 14 Cal., 486; I. R., 14, I. A., 71.

A teis-khana register prepared by a patwari under rules framed by the Board of Revenue, under Section 16 of Regulation XII of 1817, is not a public document; *Baig Nath Singh v. Sukhu Mahlon*, I. L. R., 13 Cal., 534.

Copies of income tax papers made under rules according to Section 38 of Act II of 1886 have been held not to be admissible under ss. 76, 77; *Ali Khan Bahadur v. Indur Parshad*, I. L. R., 23 Cal., 950.

75. All other documents are private.

Private documents.

76. Every public officer having the custody of a public document, which any person, has a right to inspect, shall give that person, on demand, a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such copy that it is a true copy of such document or part thereof as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

Certified copies of public documents.

Explanation.—Any officer who, by the ordinary course of official duty, is authorized to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this Section.

Note.

Copies of Public Documents.—The principal documents, which the public have a right to inspect, are the various Registers kept in Registration Offices under the Registration Act III of 1877. The Act contains specific directions as to the persons who may inspect and to whom copies must be given. So also inspection is allowed of the Register of members of a Joint Stock Company, Act VI of 1882, Section 55; and, in case of such inspection being refused, any High Court Judge can compel immediate inspection. By Section 220 (e) of the same Act every person may inspect the documents kept by the Registrar of Joint Stock Companies, and obtain copies on payment of the legal fees. So also the books kept by the Administrator-General showing the accounts of each estate, receipts, disbursements, debts, &c., are open to inspection, Act II of 1874, Section 48. Marriage Registers under Act XV of 1872, Christian Marriage Act. may also be inspected and copies of entries obtained—Section 79; so also the Register of Copyright, under Act XX of 1847, and the declarations of owners of Presses and Periodicals under Act XXV of 1867. A certified copy, accordingly, granted under any of these or similar enactments is proof of the matter stated. As to the inspection of documents kept by

the Registrar of joint stock companies, see Act VI of 1882, Section 220 (c). The Codes of Civil and Criminal Procedure provide specially for copies of the Judgment, or order, the charge, depositions and charge to the Jury being supplied to the person concerned. Civ. P. C., 1882, Sections 217 and 580, Cr. P. C., 1882, Sections 210, 371 and 548. Care must be taken in all cases under this section that its requirements are strictly complied with, that the certificate of the copy being a true one is signed, dated by the proper officer, and sealed, whenever he is authorized to use a seal.

Production of
such copies

77. Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies.

Note.

Certified copies are the only secondary evidence of public documents admissible: see Section 65, (c). The distinction between 'certified' and 'examined' copies, known to English law, is not preserved by the Act.

An entry of "a special condition" in a registry of Mahomedan marriages under Bengal Act I of 1876 may be proved by a certified copy; *Khadem Ali v. Tajimunnissa*, I. L. R., 10 Cal., p. 608.

Proof of other
public docu-
ments

78. The following public documents may be proved as follows:—

(1) Acts, orders, or notifications of the Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government,

by the records of the departments certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government:

(2) The proceedings of the Legislatures,

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of Government:

(3) Proclamations, orders, or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,

by copies or extracts contained in the *London Gazette*, or purporting to be printed by the Queen's Printer :

(4) The Acts of the Executive or the proceedings of the legislature of a foreign country,

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or Sovereign, or by a recognition thereof in some public Act of the Governor-General of India in Council :

(5) The proceedings of a municipal body in British India,

by a copy of such proceedings certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body :

(6) Public documents of any other class in a foreign country,⁽¹⁾

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country.

Note.

Proof of public documents under English law.—31 & 32 Vic. c. 37, and 34 & 35 Vic. c. 70, provide for the proof of the contents or proclamations by Her Majesty or by the Privy Council and various officials by copies certified by the several officials therein denoted.

These provisions are specially referred to in Section 82 of the present Act. 14 & 15 Vic. c. 99, Section 7, and 28 & 29 Vic. c. 63, Section 6 provide for the proof in England of various proclamations, orders and judicial proceeding in the Colonies, including India. The Naturalization Act, 1870, Section 12, provides for the proof of declarations, certificates and entries under the Act.

(1) “Of any other class,” *i.e.*, than those mentioned in subsection (4).

PRESUMPTIONS AS TO DOCUMENTS.

Presumption
as to genuine-
ness of certi-
fied copies.

79. The Court shall presume every document purporting to be a certificate, certified copy, or other document, which is by law declared to be admissible as evidence of any particular fact, and which purports to be duly certified, by any officer in British India, or by any officer in any Native State in alliance with Her Majesty, who is duly authorized thereto by the Governor-General in Council, to be genuine :

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer, by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

Note.

Presumptions as to documents.—There are some presumptions as to documents, known to English law, for which no express provision is made in the Act, and which, therefore, can be raised only under the general provision in Section 114. Thus “when several sheets of paper, constituting a connected disposal of property, are found together, the last only being duly signed and attested as a will it will (even in spite of partial inconsistencies in some of the provisions,) be presumed that each of the sheets so found formed a part of the will at the time

of its execution."—*Tayl.*, § 162. So, also, the Court will presume that pencil alterations in a will are deliberative; *Marsh v. Marsh*, 1 Swab. & Trist. 528, and not intended to be final, especially if there be other alterations in ink, or if the rest of the will appears to be drawn with care while the pencil alterations are incomplete and inaccurate. But this presumption may be got rid of by proof of any facts tending to show that the pencil alterations were finally intended to form part of the will.

So, also, the English law presumes that all alterations, interlineations and erasures in a will were made subsequent to the execution of the will and codicils, and will grant probate of the will in its original form. The contrary presumption is raised in the case of deeds, and even as to wills, original blanks, filled up, will be presumed to have been filled up previous to the execution. On the other hand there is a presumption, in the absence of all evidence on the point, that alterations or interlineations in a deed were made before execution. There is no presumption in the case of an instrument not under seal, except that alterations or interlineations were so made as not to constitute an offence.—*Steph. Dig. Art. 89.*

According to English law there is a conclusive presumption that a deed under seal has been executed for good consideration; and want of consideration cannot, except when fraud is alleged, be pleaded against such an instrument. No such presumption is sanctioned by the present Act, but a deed until it is impeached would be conclusive proof of the consideration which it recites; *Lowe v. Peers*, 4 Burr., 2225.

There is also a presumption in English law that a proved document was executed on the day on which it bears date; and if there are more documents than one, bearing the same date, that they were executed in the order necessary to effect the object for which they were executed. Independent proof of date, however, must be given in cases in which collusion might be practised and would, if practised, injure any person or defeat the law.—*Steph. Dig., Art. 85.*

By section 122 of the Merchant Shipping Act, 1894, every erasure, interlineation, or alteration in any agreement with the crew (except additions made for shipping substitutes or persons engaged after the first departure of the ship) is wholly inoperative, unless proved to have been made with the consent of all the persons interested in it by the written attestation (if made in Her Majesty's Dominions) of some superintendent of a Mercantile Marine Office, Justice, Officer of Customs, or other public functionary, or elsewhere, of a British Consular officer, or, where there is no such officer, of two respectable British merchants.

Presumption
on production
of record of
evidence

80. Whenever any document is produced before any Court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person taken in accordance with law and purporting to be signed by any Judge or Magistrate or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements, as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement, or confession was duly taken.

Note.

As to the mode in which evidence shall be recorded in a suit, see Chapter XV of the Civil Procedure Code. In Criminal cases, Chapter XXV of the Criminal Procedure Code and as to confessions, Sections 164 and 533. See also s. 26, *ante* p. 148 and s. 114, p. 309 *post*.

As to the presumption as to judicial records of Courts in other countries, see *post*, Section 86.

This section does not warrant the presumption that the deposition of a witness has been duly taken and attested by the Court in the presence of the accused; *Queen-Empress v. Poph Singh*, I. L. R., 10 All., 174; *Queen-Empress v. Riding*, I. L. R., 9 All., 720; *Kachali v. Queen-Empress*, I. L. R., 18 Cal., 129. It seems that a presumption that a witness actually said what it is recorded in his deposition that he did say is one which arises under this section; *Queen-Empress v. Samiappu*, I. L. R., 15 Mad., 63. In order to use the deposition of an accused person against him it must first be proved that he is the person who made it; *Queen-Empress v. Durga Sonar*, I. L. R., 11 Cal., 580.

The rule here laid down applies to statements or confessions of prisoners taken down by a judicial officer of a Foreign State when taken under circumstances and certified in such a manner as would otherwise render them admissible; *Queen-Empress v. Sundar Singh*, I. L. R., 12 All., 595.

81. The Court shall presume the genuineness of every document purporting to be the *London Gazette*, or the *Gazette of India*, or the Government Gazette of any Local Government, or of any colony, dependency, or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

Presumption
as to Gazette.

As to the meaning of proper custody, see *post*, Section 90, p. 242.

82. When any document is produced to any Court purporting to be a document which, by the law in force for the time being in England or Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland without proof of the seal or stamp or signature authenticating it, or of the Judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp, or signature is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims, and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland.

Presumption
as to docu-
ment admis-
sible in Eng-
land without
proof of seal
or signature.

Note.

Documents receivable in England without proof of seal or signature.—By 8 & 9 Vic. c. 113 (*The Documentary Evidence Act, 1845*), it is provided that “whenever by any Act now in force or hereafter to be in force, any certificate, official or public document, or document

or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular before any legal tribunal or in any judicial proceeding, the same shall be respectively admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed or signed alone as required, or impressed with a stamp and signed as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same."

By the English Common law, official registers, books kept in public offices recording particular transactions, and other documents of a public nature are generally admissible in evidence without proof of their authenticity by the evidence of the persons who prepared them. And, by 14 & 15 Vic. c. 99, Section 14, whenever any document is of such a public nature as to be admissible in evidence on its mere production from proper custody, and no Statute exists which renders its contents proveable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified by the officer to whose custody the original is entrusted. Under this provision it has been decided that certified copies may be given in evidence of the contents of parish registers, of the books of Births, Marriages and Deaths in India which are deposited with the Secretary of State; of Registers of Marriages kept by British Consuls abroad previous to 28th July 1849 (12 & 13 Vic. c. 68, Section 28); and of foreign Registers of Marriage, on proof that they are required to be kept by the laws of the countries to which they are respectively belong.—*Tayl.*, § 1600 *n*.

The following are some of the documents which, under the provisions of the English Statute law, can be proved by certified copies, and which are of likely occurrence in Indian Courts; Registers of Births, Marriages and Deaths made pursuant to the Registration Act 6 & 7 W. IV, c. 86; books, notices or documents directed by the Foreign Marriage Act 1892 to be kept by the marriage officer in foreign places or in the archives of his office; 55 & 56 Vic. c. 23, s. 16; the register book under Part I of the Merchant Shipping Act 1894, a certificate of registry under the same Act, an indorsement on such certificate, a declaration made in pursuance of Part I of the same Act in respect of a British ship: 57 & 58 Vic. c. 60, ss. 64, 695; entries in the official log-book, ss. 239, 695, documents transmitted by Superintendents and Officers of Customs to the Registrar General of Shipping and Seamen may also be proved by a certified copy, ss. 256, 695.

83. The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate; but maps or plans made for the purposes of any cause must be proved to be accurate.

Proof of maps made for purposes of any cause.

Note.

Where an Amin made a thakbust map, this raised no presumption as to the amount of debuttur lands on the land mapped under this section; this section does not make *ex parte* statements of proprietors or tenants made at a survey evidence as to the character of a holding; *Jarao Kumari v. Lalonmoni*, I. L. R., 18 Cal., 224; L. R., 17 I. A. 145. The fact that a map made under the authority of Government has been superseded by one made under the same authority does not affect the presumption in favour of the former; *Joggeessur Singh v. Byeunt Nath Dutt*, I. L. R., 5 Cal., 822.

As to the relevancy of such maps or plans, see s. 86, p. 179 *ante*.

84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country, and of every book purporting to contain reports of decisions of the Courts of such country.

Presumption as to collections of laws and reports of decisions.

85. The Court shall presume that every document purporting to be a power of attorney, and to have been executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty or of the Government of India, was so executed and authenticated.

Presumption as to powers of attorney.

Note.

See Indian Registration Act, 8 of 1877, Section 33, as to powers of Attorney recognized for the purposes of that Act. The provisions of that section are not affected by the present Act: see Section 2, *ante*, page 77.

The formalities prescribed by this section must be conformed with, before the powers of attorney will be admitted; In the goods of Prinrose, I. L. R., 16 Cal., 776.

The registration of a power of attorney is not enough without further proof to prove its execution; *Salimatul-Fatima v. Koylashpoti Narain Singh*, I. L. R., 17 Cal. 903, overruling *Kristo Nath Coondoo v. Brown*, I. L. R., 14 Cal. at p. 180.

Presumption
as to certified
copies of for-
eign judicial
records.

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India [in or for] such country to be the manner commonly in use in that country for the certification of copies of judicial records.—[*Act III of 1891*, s. 8]

An officer who, with respect to any territory or place not forming part of Her Majesty's dominions, is a political Agent therefor, as defined in section 3 of the Foreign Jurisdiction and Extradition Act, 1879, [*XXI of 1879*] and section 190 of the Code of Criminal Procedure, 1882 [*X of 1882*] shall, for the purposes of this section, be deemed to be a representative of the Government of India in and for the country comprising that territory or place.—[*Act III of 1891*, s. 8.]

Note.

Certified copy of Foreign judgment.—In *Sreemutty Monemoheeny Dossee v. Greeschunder Bose*, 8 M. J., 14, Macpherson. J., admitted in evidence the copy of a foreign judgment, which was sworn to by a witness as having been duly sealed and certified by the Registrar of the Foreign Court, but which was not, according to the present section, certified by the representative of Her Majesty or of the Government of India.

But the Court can go behind the certificate of registration where it finds that the officer purporting to register a document had no jurisdiction; *Mitter v. Mondul*, I. L. R. 14 Cal., 449.

The Civil Procedure Code, 1882, Section 13, *Explanation VI* declares that "where a foreign judgment is relied on, the production of the judgment duly authenticated is presumptive evidence that the Court which made it had competent jurisdiction, unless the contrary appear on the record; but such presumption may be removed by proving the want of jurisdiction." In *Ganu Mahomed Sarkar v. Tarini Choran Chuckerbati*, I. L. R., 14 Cal., 546, however, it was held that certified copies of judicial records of a state which has no British Representative cannot be received in the Courts of British India under this section.

87. The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for its inspection, was written and published by the person, and at the time and place, by whom or at which it purports to have been written or published.

Presumption
as to books
and maps.

88. The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent; but the Court shall not make any presumption as to the person by whom such message was delivered for transmission.

Presumption
as to tele-
graphic mes-
sages.

89. The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped, and executed in the manner required by law.

Presumption
as to due exe-
cution, &c. of
documents not
produced.

Note.

Presumptions as to documents called for and not produced.—Where the documents is called for and not produced, the Court *shall* make the prescribed presumption: in the case of other documents, the Court *may* make the presumption, if it thinks fit under Section 114; but it is not obligatory.

Lost document presumed to be stamped.—According to the English authorities a document, which is lost, will be presumed to be duly stamped until the contrary is shown; *Pooley v. Goodwin*, 4 A. & E., 94.

Documents
thirty years
old.

90. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document which purports to be in the handwriting of any particular person is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested, by the persons by whom it purports to be executed and attested.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section eighty-one.

Illustrations.

(a) A has been in possession of landed property for a long time. He produces from his custody deeds relating to the land showing his titles to it. The custody is proper.

(b) A produces deeds relating to landed property of which he is the mortgagee. The mortgagor is in possession. The custody is proper.

(c) A, a connection of B, produces deeds relating to lands in B's possession, which were deposited with him by B for safe custody. The custody is proper.

Note.

Under the corresponding rule of English law execution or attestation of document, 30 years old produced from proper custody, need

not be proved, although there is an attesting witness present in Court; *Steph. Dig., Art. 88.*

In England it is questionable whether this rule applies to an instrument bearing the seal of a Court or Corporation.—*Tayl.*, § 87. No such distinction is retained in the present Act.

Before accepting a document as proof of title under this section a Court would do well to satisfy itself that the person, whose signature is to be presumed genuine, was competent to grant such a document; if a document is signed by an agent, there is no presumption under this section as to the agent's authority; *Aggravant Chowdhry v. Hurro Chunder Shickdar*, I. L. R., 6 Cal., p. 211.

The value to be attached to the evidence of a document admitted under this section will depend on the circumstances of each case and the corroboration which they afford. Such corroboration may be afforded by proof of the production of the document on previous occasions when it would naturally have been produced, by acts done under it, or enjoyment had in accordance with its terms; *Roikunt Nath Kundu v. Lukhun Maghi*, 9 C. L. R., 425.

The execution of a deed more than thirty years old lost out of proper custody may be presumed under this section; *Khetter Chunder Mookerjee v. Khetter Paul Sreeterutno*, I. L. R., 5 Cal. 886.

In applying the presumption allowed by Section 90 of the Indian Evidence Act, the period of 30 years is to be reckoned, not from the date upon which the document is filed in Court, but from the date on which, it having been tendered in evidence, its genuineness or the reverse becomes the subject of proof; *Minu Sirkar v. Rhedoy Nath Roy and others*, 5 C. L. R., 135.

A daughter's custody of a pottah granted to her father, she having been in possession for 40 years ever since his death, was held to be "proper;" *Traitolokia Nath Nundi v. Shurno Shungoni*, I. L. R., 11 Cal. 539. See *Hari Uhintaman Dikshit v. Moro Lakshman*, I. L. R., 11 Bom., 89.

CHAPTER VI.

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE.

91. When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced

Evidence of
terms of
written con-
tract.

to the form of a document,⁽¹⁾ no evidence shall be given in proof of the terms of such contract, grant or other disposition of property,⁽²⁾ or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.

Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.

Exception 2.—Wills [admitted to Probate in British India] may be proved by the Probate.⁽³⁾—[*Act XVIII of 1872, s. 7.*]

Explanation 1.—This section applies equally to cases in which the contracts, grants or disposition of property referred to are contained in one document, and to cases in which they are contained in more documents than one.⁽⁴⁾

Explanation 2.—Where there are more originals than one, one original only need be proved.⁽⁵⁾

Explanation 3.—The statement in any document whatever of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.⁽⁶⁾

Illustrations.

(a) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved.

(c) If a bill of exchange is drawn in a set of three, one only need be proved

(d) A contracts in writing with B for the delivery of indigo upon certain terms. The contract mentions the facts that B had paid A the price of other indigo contracted for verbally on another occasion

Oral evidence is offered that no payment was made for the other indigo. The evidence is admissible

(e) A gives B a receipt for money paid by B

Oral evidence is offered of the payment.

The evidence is admissible.⁽⁷⁾

Note.

(1) **Matters required by law to be in writing.** See Indian Contract Act IX of 1872, Section 10.

The number of contracts which the law requires to be in writing (Contract Act IX of 1872, § 25, etc.) has been largely extended by § 54 of the Transfer of Property Act, 1882, which in all cases but those, in which the property is worth less than 100 rupees and in which physical delivery is possible, necessitates a document for a valid transfer of an interest in immovable property. See too §§ 107, 128 as to leases, and gifts of immovable property.

Wills.—Another important class of matters required by law to be reduced to the form of a document are testamentary dispositions of property in cases to which the Indian Succession Act, X of 1865, or the Hindu Wills' Act (XXI of 1870) apply. The latter enactment affects the wills of Hindus, Jainas, Sikhs and Buddhists in the Lower Provinces of Bengal and the Presidency Towns of Madras and Bombay: it is provided however by Section 100 of this Act that nothing in this chapter contained shall affect any provision of the Indian Succession Act, 1865, as to the construction of wills. See page 281.

Confessions.—Where a confession taken under Section 122 of the Criminal Procedure Code (Act X of 1872) was inadmissible in evidence, oral evidence to prove that such a confession was made, or what the terms of that confession were, was held inadmissible under this section; *R. Dai Ratan*, 10 Bom. H. C. Rep., 166: followed in *R. v. Shivya*, 1 I. L. R., (Bom.), 219. See also *R. v. Dayá A'nand*, 11 Bom. H. C. Rep., p. 44.

Where Registration Act compels Registration.—The Registration Act III of 1877, Section 49, declares that no instrument, required

by the 17th section to be registered, shall affect any immoveable property, comprised therein, or confer a power to adopt or be received in evidence of any transaction affecting such property or power unless it has been registered.

Where a sale-deed could not be received owing to want of registration, it was held that the sale could not be proved by admissions made by the vendor; *Somu Gurukkal v. Rangammal*, 7 M. H. C. Rep., 13. An unregistered deed requiring registration may be admitted as evidence for a purpose collateral to its main use, if the collateral purpose is distinctly separable from the other and is not such as to make registration necessary. The following deeds though unregistered were admitted as evidence of the collateral obligations they respectively created in the following cases: a mortgage lease, as containing a covenant to register; *Sham Narayan Lall v. Khimayit Mater*, 4 B. L. R., F. B. 2: a deed promising repayment and assigning immoveable property as a security, as constituting a bond to repay; *Lachmipat Singh Dagar v. Mirza Khairat Ali*, 4 B. L. R., F. B., 18, and see *Krishto Lall Ghose v. Bonomalu Roy*, I. L. R., 5 Cal., 611, and *Ulfatunissa Elahijan Bibi v. Hosain Khan*, I. L. R., 9 Cal., 520, and the cases there quoted; a deed of sale, as a receipt or acknowledgment of money paid or an acknowledgment for old debts; *Shib Prasad Das v. Anna Purna Dayi*, 3 B. L. R., (A. J. C.) 451. Want of registration has been held to make the following documents inadmissible even as evidence of the collateral obligation they respectively created in the following cases; a lease containing a stipulation for payment of damages on non-delivery of the land, as giving a right of action on non-delivery; *Martin v. Sheo Ram Lal*, I. L. R., 4 All., 232; a mortgage, as proving a debt indivisible from the mortgage; *Mattongency Dossee v. Ramnarain Saikhhan*, I. L. R., 4 Cal., 83; a deed of gift containing a covenant of title, as giving ground of action on a breach of the covenant; *Raju Balu Krishkna Ra v. Ramchandra*, I. L. R., 2 Bom., 273: a lease containing a covenant for quiet enjoyment against kinsmen of the lessor, as giving ground for a breach thereof; *Gurunath Shrivinas Desai v. Shenbasappa*, I. L. R., 18 Bom., 745. The endorsement on an hypothecation bond of the payment of the amount due is admissible; *Venkatarama Naik v. Chinnathambu Reddi*, 7 M. H. C., Rep., p. 1.

An endorsement of a regrant on a Sanad does not require registration as effecting a transfer of property but is admissible as evidence of such a transfer; *Herambder Dhamedharder v. Kharsinath Bhaskar*, I. L. R., 14 Bom., 472.

Acknowledgments to save the Statute of Limitation.—The Limitation Act XV of 1877, Section 19, provides that “If, before the expiration of the period prescribed for a suit or application in respect of

any property or right, an acknowledgment of liability in respect of such property or right has been made in writing, signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation, according to the nature of the original liability, shall be computed from the time when the acknowledgment was so signed. When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received." The Limitation Act of 1871, Section 20, required promises or acknowledgments in respect of a debt or legacy to be in writing and signed. As to such promises or acknowledgments in suits instituted previous to 1st April 1873, see Act XIV of 1859, Section 4. Such promises need not be supported by consideration: see Contract Act IX of 1872, Sec. 25, (3).

Contracts.—The acceptance of a bill of exchange must be signed. Act XXVI of 1881, Section 7. Promises made on account of natural love and affection between parties standing in a near relation to each other, though without consideration, are valid under the Contract Act, 1872, Section 25, (1), if in writing and registered. Previous to the passing of the Contract Act, 1872, there were various transactions, such as leases, agreements for leases, promises to answer for the debt of another, ratifications of debts incurred during minority, which, as between parties personally subject to English law, were invalid unless reduced to writing. This necessity no longer exists except in cases which fall within the Transfer of Property Act, 1882. As to contracts by Municipalities, see Acts IX of 1867 (*Madras*), Section 4: IV of 1873 (*Punjab*), Section 18: III of 1864 (*Bengal*), Section 9: III of 1872 (*Bombay*), Section 54.

By Section 36 of Act XIX of 1868 (*Oudh Rent Act*) in a suit between landlord and tenant, the tenant is not liable to pay rent other than that payable for the last preceding year unless the Court is satisfied by evidence in writing that the parties have so agreed.

Necessity for a document under Hindu law.—The requirements of Hindu law with respect to the necessity for a document are thus discussed by Scotland, C. J.: "Upon the only point now before us we must hold the present transaction valid. It seems from the case just referred to and other authorities, that, under the Hindu law, proof of a verbal grant of land, whether by way of exchange, sale or gift, is good when followed by possession and otherwise unobjectionable. Indeed, in no case does Hindu law appear absolutely to require writing, though as evidence it regards and inculcates a writing as of additional force and value.—1 *Strange's Hindu Law*, 277. See also a case decided by the Madras Sudder Adalat, Special Appeal, No. 56 of 1857, where a verbal assignment of waste land was held valid."

"There are instances, no doubt, in which works of authority speak expressly of particular transactions being evidenced by writing. But I believe in no case can it be considered now that the Hindu law in this respect is treated as being anything more than directory. The great importance and value, however, of written instruments as evidence, make it most desirable for the true interests of the parties and the ends of justice that they should be generally adopted; and where from the circumstances and nature of the transaction, or the dealings between the parties, or from the usages of the country, a writing was reasonably to be expected, mere oral evidence would very properly be received and acted upon with extreme caution and deliberation; as such evidence alone can unquestionably be easily made the means of falsehood and fraud. The reported cases, in which the Sudder Court appears to have decided against the sufficiency of oral evidence in the instances of a sale of land, an assignment of a bond, and a perpetual lease, we cannot. I think, regard as satisfactory authorities in so far as they were intended to decide not merely the insufficiency of the particular circumstances in evidence in each case, but that the law rendered a writing absolutely indispensable to the validity of such sales, assignments and leases." *Mantena Rayaparaj v. Chekuri Venkataraj*, 1 M. H. C. Rep., 100.

The authority to the widow to adopt need not be in writing, though it generally is; as in prudence it ought to be, time and means existing—*Strange, H. L.*, 80. Nor, according to the Hindu law, need the adoption itself be in writing, *Id.*, 98, and though in cases of partition the law prescribes "a written memorial of distribution, yet it has not rendered it indispensable."—*Id.*, 222. "We understand it to be undisputed," it was observed by the Judicial Committee of the Privy Council, "that a division (of a joint Hindu family) may be effected without instrument in writing; *Rewun Persad v. Mussumat Radha Beeby*, 4 Moore's I. A., 137, at page 168.

"Reduced to the form of a document."—The meaning of this expression is thus explained by Mr. Taylor:

"Parol evidence will be admissible, when the writing only amounted, either to mere unaccepted proposals, or to minutes capable of conveying no definite information to the Court or Jury, and could not, by any sensible rule of interpretation, be construed as memoranda, which the parties themselves intended to operate as fit evidence of their several agreements. Thus it has been admitted, where at the time of letting premises to the defendant, the plaintiff had read the terms from pencil minutes, and the defendant had acquiesced in these terms, but had not signed the minutes; where, upon a like occasion, a memorandum of agreement was drawn up by the landlord's bailiff, the terms of which were read over and assented to

by the tenant, who agreed to bring a surety and sign the agreement on a future day, but omitted to do so; where, in order to avoid mistakes, the terms upon which a house was let, were, at the time of letting, reduced to writing by the lessor's agent, and in his absence signed by the lessee's wife, in order to bind him, and the lessee himself afterwards entered upon and occupied the premises but did not otherwise appear to have constituted the wife as his agent, or to have recognized her act: where lands were let by auction, and a written paper was delivered to the bidder by the auctioneer, containing the terms of the letting, but was never signed either by the auctioneer or by the parties; and where, on the occasion of hiring a servant, the master and servant went to the chief constable's clerk, who, in their presence, and by their direction, took down in writing the terms of the hiring, but neither party signed the paper, nor did it appear to have been read to them."—*Tayl.*, § 406.

In none of these cases was the *contract* reduced to writing.

The question whether the terms of the contract, grant or disposition of property have been "reduced to the form of a document" is often, in cases in which there has been a writing, one of considerable difficulty. The fact of there being a writing does not necessitate the conclusion that it was intended to constitute the contract, and a Judge must look to the whole transaction to see whether it was so or not. Thus, with regard to the bought and sold notes, given by brokers to their principals, it has been held that the mere fact of their delivery does not prove an intention to contract in writing, and that, in case they disagree, other evidence of the contract may be given. "I by no means say," observed Lord Campbell, "that where there are bought and sold notes, they must necessarily be the only evidence of the contract: circumstances may be imagined in which they might be used as a memorandum of a parol agreement..... What are called the bought and sold notes were sent by him (the broker) to his principals by way of information that he had acted upon their instructions, but not as the actual contract which was to be binding upon them;" *Sievwright v. Archibald*, 17 Q. B., 104, page 124.

"The production of a paper purporting to be an agreement by a party, with his signature attached, affords a strong presumption that it is his written agreement; and, if in fact he did sign the paper *animo contrahendi*, the terms contained in it are conclusive, and cannot be varied by parol evidence: but in the present case the defence begins one stage earlier: the parties met and expressly stated to each other that, though for convenience they would then sign the memorandum of the terms, yet they were not to sign it as an agreement until Abernethie was consulted. I grant the risk that such a defence may be

set up without ground; and I agree that a jury should therefore always look on such a defence with suspicion; but, if it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those so signing. The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible;" *per* Erle, J., in *Pym v. Campbell*, 6 E. & B., 370, at page 373. See also the remarks of Pollock, C. B., and Bramwell, B., in *Harris v. Rickett*, 28 L. J., Exch., 197. Holloway, J., following *Abrey v. Crur*, L. R. 5 C. P., 37, held in *Ruthna Mudaliyar v. Arumuga Mudaliyar*, 7 Madras H. C. Rep., p. 189, that oral evidence was inadmissible to show the rate of interest *d'hors* that of the promissory note, but Kernan, J., when the case was heard on appeal, pointed out that in *Abrey v. Crur* "the defendant admitted the contract contained in the bill, but set up something inconsistent with the mode of payment expressed on the bill," whereas in *Ruthna Mudaliyar v. Arumuga Mudaliyar* the plaintiff's case was that the promissory note was not the contract. In that case the plaintiff sued for a balance of principal due for money lent, with interest thereon at 5 per cent. per mensem. His case was that the defendant, being indebted to him on a promissory note for Rs. 500, applied to him for a further loan of Rs. 1,500, proposing to lay out the whole amount of Rs. 2,000 in the performance of a contract then subsisting between himself and the Madras Railway Company, and offering to give plaintiff a share in such contract: that plaintiff consented to lend the said sum payable with interest at 6 or 7 per cent. per mensem, in lieu of becoming a partner, and also to give defendant two months' previous notice on requiring repayment of the loan. Defendant objected to the rate of interest, which he said he would further consider on his return to Cuddapah; but, being in immediate want of the money, proposed to borrow it on a promissory note. Plaintiff, accordingly, on the 13th October 1870, lent defendant Rs. 1,500, and obtained, in lieu of the note for Rs. 500, which was returned, a promissory note for Rs. 2,000, payable on demand, with interest at 12 per cent. per annum, which note, plaintiff alleged, it was agreed should be cancelled on receipt of a letter from the defendant fixing the rate of interest. This was denied by the defendant. Defendant subsequently wrote two letters to plaintiff, agreeing to pay interest at 5 per cent. per mensem, and plaintiff endorsed the said note as cancelled. Plaintiff also alleged that he received interest at the rate of 5 per cent. per mensem for two months, and produced a witness who deposed to that effect. This the defendant denied. Holloway, J., held that evidence *d'hors* the promissory note was inadmissible to show the rate of interest. On appeal, Morgan,

C. J., and Kernan, J., held that the evidence was admissible, the Chief Justice observing, "I take the law to be that, notwithstanding a paper writing which purports to be a contract may be produced, it is still competent to the Court to find upon sufficient evidence that this writing is not really the contract. And the risk of a groundless defence does not affect the rule itself, though it suggests caution in acting on it."

In a suit upon a *hathchitta* the Court, having regard to the informal nature of the document sued upon, allowed evidence to be given of a verbal agreement to repay the amount acknowledged, with interest, no mention having been made as to interest in the *hathchitta* itself; *Umesh Chunder Banerjee v. Mohini Mohun Das*, 9 C. L. R., 301.

In *Pothi Reddi v. Vesagudasan*, I. L. R., 10 Mad., 94 the terms of a contract to repay a loan with interest had been settled and the money paid. A promissory note specifying these terms was executed later in the day by defendant and given to plaintiff. This note was not stamped. In a suit brought to recover the balance of the loan on an oral contract to pay, it was held that the contract had been reduced into writing and that as the unstamped note was not receivable in evidence, the plaintiff's claim failed. See too *Damodar Jagannath v. Atmaran Babaje*, I. L. R., 12 Bom., 448; *S. A. Ralli v. Uaramalli Faral*, I. L. R., 14 Bom., 102. But where land had been let in perpetuity on *bazendari* tenure for building purposes by a written contract which was inadmissible because it was not registered, but the plaintiff made out a *prima facie* case without disclosing its existence, he was held not thereby to be disentitled to a decree; *Yeshwadbhai and Gopikubai v. Ramchandra Takaram*, I. L. R., 18 Bom., 66.

Question as to liquidated damages or penalty.—In *Behary Lal Doss v. Tej Narain*, I. L. R., 10 Cal., 765, a suit was brought on a bond. The Court held that the sum reserved was liquidated damages and not a penalty, and refused to allow the defendant to give evidence that the plaintiff had, subsequent to execution, stated that the claim was intended to operate as a penalty.

(2) **The exclusion refers only to rights and liabilities arising under the Contract.**—Sections 91 and 92 must be understood as referring only to civil rights or liabilities created by the terms of the document in question. A party to a document may, as against another party to it, give evidence in variation of its terms, if the object of the evidence is not to vary any right or liability arising under the contract, but to prove some independent fact. For instance, where the question was whether A had obtained money from B on false pretences, the false pretence being the consideration for a partnership; B was allowed to

prove that the false pretence was something other than the consideration recited in the partnership deed; *R. v. Adamson*, 2 Moody, 286; Stephen's Digest, Art. 92.

Care must be taken to distinguish between cases, in which the transaction itself is required by law to be reduced to the form of a document, (and which fall, therefore, within the section) and cases of which the law merely requires a documentary record to be kept, to which the section does not necessarily apply. So, Mr. Taylor observes "the fact of birth, baptism, marriage, death, or burial, may not be proved by parol testimony, for though the law requires a narrative or a memorandum of these events to be entered in registers, the existence or contents of these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of that fact, which may furnish a satisfactory and convenient mode of proof, but cannot exclude other evidence, while the non-production of a minute book or register at most does no more than afford grounds for scrutinizing such evidence with more than ordinary care.—*Tayl.*, § 416. So also, although a stamped receipt is provided for in Section 27 of the Stamp Act, 1869, this would not prevent the production of other evidence of the payment in question. This corresponds with the English law; *Lambert v. Cohen*, 4 Esp., 218.

Consideration for a contract may be proved aliunde.—This will not preclude proof being given *aliunde* of the consideration for a contract where no mention of it is made in the contract, and where, as is often the case, it is necessary to prove consideration in order to support the validity of a contract. If A contracts with B, the consideration which leads him to do so is B's contract with him, and, if this has not been reduced to writing, there is no objection to its being proved in any other way. This is the English law. "If no consideration is stated in a deed, the party will be allowed to prove one by extrinsic evidence: and if the deed is expressed to be made "for divers good considerations" it may be averred and proved by parol that the bargainee gave money for his bargain; *per* Lord Eldon, *Peacock v. Monk*, 1 Ves. Sen., 126, at page 127.

(3) "**Wills admitted to Probate in British India.**"—These words were substituted by the amending Act XVIII of 1872, for "Wills under the Indian Succession Act," as the latter wording would have excluded wills proved previous to the passing of Act X of 1865 from the benefit of the section, and there was a divergence of opinion in the Courts as to the effect of probate in the case of such wills. The amendment would have been more complete if it had extended to probates granted by the English Courts. Such probates would, however, appear to be admissible for the purpose of proving a will under Sections 74 and 77.

“Probate.”—By Section 3 of the Indian Succession Act, “‘Probate’ means the copy of a will certified under the seal of the Court of competent jurisdiction, with a grant of administration to the estate of the testator.” Part 29 (Sections 179 to 189 both inclusive and 191 to 199 both inclusive) and so much of Parts 30 and 31 of Act X of 1865 as relates to grants of Probates and letters of Administration with the will annexed, amongst other parts of the said Act, were extended to the wills of Hindus, &c., by Act XXI of 1870. The power of granting and revoking probates is vested in the District Judge in all cases within his District (s. 235, *et seq.*). “District Judge” is defined by Section 3 to mean “the Judge of a Principal Civil Court of original jurisdiction.” The effect of the Hindu Wills Act, XXI of 1870, is to make the probate of a will evidence of the will against all persons interested under the will; *Brajanath Dey Sirkar v. Anandamayji Dasi*, 8 B. L. R., 208.

By Section 208, of the Indian Succession Act, if a will has been lost since the testator's death, or has been destroyed by wrong or accident, and not by any act of the testator, probate may be granted of a copy of the draft, if such has been preserved.

By Section 209, if a will has been destroyed or lost, and no copy has been made, nor the draft preserved, probate may be granted of its contents if they can be established by evidence.

The words “since the testator's death” in Section 208 appear to exclude cases of loss before the testator's death; but Section 209 has no such restriction, and the intention must have been to allow secondary evidence in all cases in which the non-production of the will was sufficiently accounted for. Of course, if the loss of the will came to the testator's knowledge, and he took no steps to replace it, it would be evidence of an intention to die intestate. Where the will is in the possession of a person, out of the province, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary in the interests of the estate that probate be granted forthwith, probate may, under Section 210 of the Indian Succession Act, be granted upon the copy, limited as provisional until the will or an authenticated copy be produced.

(4) **Contracts, &c., contained in one or more documents.**—When a contract is completed through a broker, the ordinary course is for him to sign an entry in his book, as common agent of the seller and buyer, and to send a ‘bought note’ to the buyer, and a ‘sold note’ to the seller. Some doubts have been expressed in the English Courts as to what, in such a case, is the document containing the contract. On some occasions it has been held that the broker's signed entry is the original contract, and the bought and sold notes only copies of it: in

others it has been found as a fact that by the custom of trade the bought and sold notes constituted the contract.—See note (1). Apart from such a custom, however, the authority of the English Courts is against treating the bought and sold notes as the final contract; *Pitts v. Beckett*, 13 M. & W., 743, at page 746. “The bought and sold notes are *prima facie* evidence of the contract between the parties; but they are not necessarily the real contract. It is still competent to the defendant to show that they were not the contract. The plaintiff has to prove not only that they were signed, but that they were signed as the contract between the parties; *per* Wilde, B., in *Rogers v. Hadley*, 32 L. J., Ex., 241. See also *Cowie v. Remfry*, 3 Moore’s L. A., 448.

The Calcutta High Court has held that, where a contract of sale is effected through a broker, who sends bought and sold notes to the buyer and seller, the fact that the bought and sold notes did not agree and were not returned by the parties is not positive evidence that the parties did not agree. The contract was made before the notes were written, and the notes were sent by the broker to his principals merely by way of information: and the plaintiff is entitled to give parol evidence of the terms of the contract; *Clariton v. Shaw*, 9 B. L. R., 245.

In *Jadu Rai v. Bhubataran Nundey*, I. L. R., 17 Cal., 173, in an action on a contract contained in bought and sold notes for the delivery of certain goods, the defendant sought to shew by oral evidence that the contract was for conditional delivery. It was held however that such evidence was inadmissible.

(5) **More originals than one.**—See Section 62, Explanation 1.

(6) **Fact of existence of contract may be proved orally.**—The section applies only to evidence given in *proof of the terms* of a contract and, therefore, *the fact of there being a contract* may be proved orally though it has been reduced to writing. This distinction is of considerable importance in cases where questions are raised as to the admissibility of oral evidence of contracts recited in documents, which are themselves inadmissible in evidence under the Stamp or Registration Acts. In *Blackwell v. McNaughtan*, 1 Q. B., 127, a certificate “that Mr. McNaughtan has in his cellar, belonging to Mrs. Hartley, that is paid for, twelve dozen of portwine,” was objected to on the ground that it ought to have had an agreement stamp. The objection was overruled on the ground that “the certificate was not proof of a contract, but proof of an independent fact, from which, among others, a contract may be inferred, if the case were sufficiently made out.” In *Kedarnath Dutt v. Shamloll Khetry*, 11 B. L. R., 405, the defendant deposited certain title-deeds with the plaintiff as security for the

repayment of Rs. 1,200 lent him by the plaintiff, at the time when the deposit was made. On the same day, the defendant, by way of further security, gave to the plaintiff a promissory note for the amount of the loan, and endorsed thereon the following memorandum:— “For the repayment of the loan of Rs. 1,200 and the interest due thereon of the within note of hand, I hereby deposit with the plaintiff, as a collateral security by way of equitable mortgage, title-deeds of my property,” &c. An objection was taken to the reception of this document on the ground that it was not registered, and that as it contained the terms of the contract of deposit, oral evidence of those terms could not be admitted. The Court held that the document was not one requiring registration, and, on the subject of the admissibility of oral evidence of its contents, Couch, C. J., in delivering the judgment of the Court, observed, (page 412.) “If this memorandum was of such a nature that it could be treated as a contract for the mortgage, and what the parties considered to be the only repository, and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created, and would come within Section 17 of the Registration Act. But it was not a writing of that character. As I have said, the equitable mortgage was created by the agreement which was evidenced by the loan and the deposit of the title-deeds: the promissory note, whether given either at the same time or some hours afterwards, in pursuance of the understanding between the parties, was evidence of the terms upon which the loan was made, *viz.*, that the interest should be at the rate of 24 per cent. But as regards the contract between the parties, if there had been no memorandum at all on the promissory note, there would have been a complete equitable mortgage.....It is not by the memorandum that the Court takes the agreement on the mortgage to be proved, but by the deposit of the deeds, and this is no more than a piece of evidence showing the fact of the deposit which might be proved by any other evidence. The memorandum need not have been produced.....On the ground therefore that this was not a writing which the parties had made as the evidence of their contract, but only a writing which was evidence of the fact from which the contract was to be inferred, I think it does not come within the description of documents in the 17th section of the Registration Act.” In *Dwarkanath Mitter v. Sarat Kumari Dasi*, 7 B. L. R., 55, there was nothing to connect the debt with the deposit of the title-deeds except a letter which was written after the debt had been incurred and was sent with the title-deeds. Phear, J., therefore, held that the letter created a charge on land and required registration, without which it could not be received in evidence; he observed (page 57), “This is not a case in which the charge on land is implied from the deposit of the

deeds themselves, neither is it a case where the charge or the equitable mortgage is made expressly by parol. But it is, as I understand the plaint itself, a case where the basis of the plaintiff's claim is a written document signed by the owner of the property, and it appears to me that the document, and nothing else, creates the charge."

On the same point Mr. Taylor says: "Thus, if the fact of the occupation of land is alone in issue, without respect to the terms of the tenancy, this fact may be proved by any competent parol evidence, such as payment of rent, or the testimony of a witness, who has seen the tenant occupy, notwithstanding it appears that the occupancy was under an agreement in writing; where a tenant holds land under written rules, but the length of his term has been agreed orally, these rules need not be produced in an action of trespass where the defendant denies the tenant's possession, because it is only necessary to prove the extent of the tenant's term, which, having been agreed to by parol, does not depend upon the written rules; the fact of partnership may be proved by parol evidence of the acts of the parties, without producing the deed; and the fact that a party has agreed to sell goods on commission may be established by oral testimony, though the terms respecting the payment of the commission have been reduced into writing."—*Tayl.*, § 405.

The rule laid down in this section applies to cases in which parties agree orally to abide by the terms of a written agreement: *e.g.*, if a landlord agrees by parol with his tenant to hold on the terms of a former lease made between the landlord and a stranger, he cannot sue on the contract without producing the lease; *Turner v. Power*, 7 B. & C., 625.

Illustrations (*d*) and (*e*) give examples of matters, the mention of which in a document does not preclude their proof *aliunde*; in (*d*) because the fact mentioned, *i.e.*, A's having paid the price of the other indigo was not one of the terms of the contract: in (*e*) because a memorandum of receipt is not a "contract, grant, or disposition of property," and, therefore, no mention of any fact in a receipt interferes with its being proved in any other manner.

As to the mode of stopping oral evidence of contracts so reduced to writing, and as to the course to be pursued where oral evidence is tendered of the contents of a document, see *post*, Section 144.

(7) Oral evidence of payment is not excluded by written receipt.— "A receipt for sums paid in part liquidation of a bond hypothecating immoveable property must be registered under the provisions of Section 17 of Act VIII of 1871 [now Act III of 1877] to render it admissible as evidence under Section 49 of the said Act. Under illustration (*e*) Section 91, of Act I of 1872, such payments may

nevertheless be proved by parol evidence, which is not excluded owing to the inadmissibility of the documentary evidence;" *Dulip Sing v. Durga Prasad*, I. L. R., 1 All., 442.

92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document⁽¹⁾ have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted as between the parties⁽²⁾ to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms :

Exclusion of evidence of oral agreement.

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto ; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.⁽³⁾

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved.⁽⁴⁾ In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.⁽⁵⁾

Proviso (4).—The existence of any distinct subsequent oral agreement⁽⁶⁾ to rescind or modify any such contract, grant or disposition of property, may

be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents, not expressly mentioned in any contract, are usually annexed to contracts of that description, may be proved : Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.⁽⁷⁾

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.⁽⁸⁾

Illustrations.

(a) A policy of insurance is effected on goods “in ships from Calcutta to London” The goods are shipped in a particular ship which is lost The fact that that particular ship was orally excepted from the policy, cannot be proved

(b) A agrees absolutely in writing to pay B Rs 1,000 on the 1st March, 1873 The fact that, at the same time, an oral agreement was made that the money should not be paid till the 31st March, cannot be proved.

(c) An estate called ‘the Rampore tea estate’ is sold by a deed which contains a map of the property sold The fact that land not included in the map had always been regarded as part of the estate and was meant to pass by the deed, cannot be proved.

(d) A enters into a written contract with B to work certain mines, the property of B, upon certain terms. A was induced to do so by a misrepresentation of B’s as to their value. This fact may be proved.

(e) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed

as to one of its provisions, as that provision was inserted in it by mistake A may prove that such a mistake was made as would by law entitle him to have the contract reformed.

(f) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price A may show that the goods were supplied on credit for a term still unexpired.

(g) A sells B a horse and verbally warrants him sound. A gives B a paper in these words: 'Bought of A a horse for Rs 500.' B may prove the verbal warranty.

(h) A hires lodgings of B and gives B a card on which is written—'Rooms, Rs. 200 a month'. A may prove a verbal agreement that these terms were to include partial board.

A hires lodgings of B for a year, and a regularly stamped agreement drawn up by an attorney is made between them. It is silent on the subject of board A may not prove that board was included in the terms verbally

(i) A applies to B for a debt due to A by sending a receipt for the money. B keeps the receipt and does not send the money. In a suit for the amount, A may prove this.

(j) A and B make a contract in writing to take effect upon the happening of a certain contingency. The writing is left with B, who sues A upon it A may show the circumstances under which it was delivered

Note.

(1) **Prescribed form and matter.**—A matter required by law to be reduced to the form of a document must, in order to be admissible, be so reduced in the form and manner prescribed; *The Empress v. Mayadeb Gossami*, I. L. R., 6 Cal., 762.

In *Cowasji Ruttonji Limboowalla v. Burgorji Rustomji Limboowalla*, I. L. R., 12 Bom., 335, where the executors of a partner of a firm had executed a release to the surviving partners upon certain terms agreed to in writing, oral evidence of a further promise to give the executors something beyond the terms of the release was held inadmissible.

(2) **The words "between the parties"** mean the parties to both sides of a deed; so that in a dispute between them one of them is not precluded from giving oral evidence to show that the deed did not truly represent the facts; *Mulchand Madho v. Ram*, I. L. R., 10 All. 421.

(3) Any fact may be proved which would invalidate a document.—

This is in accordance with English law, which allows evidence to be given in variance of the terms of a contract to show that, though no illegality is apparent on the face of it, the transaction was really unlawful and the agreement consequently void. A party may be precluded from setting up his own fraud, see note to Section 44; but a defendant, sued on a bond, may plead that it was given by him for an illegal and corrupt consideration; *Collins v. Blantern*, 1 Smith's L. C., 355, (10th Edn). In a case of fraudulent misleading with respect to property pledged, the fraudulent parties were held by the Judicial Committee to be estopped by their acts from setting up, as against a third person, the mortgagor, the object of their fraud and a stranger to the agreement, the illegality of the agreement; *Nawab Sidhee Musur Ally Khan v. Rajah Ujoodhyaram Khan*, 10 Moore's I. A., 540; approved of in *Byjnath Lull v. Ramoodeen Chowdry*, I. R., 1 I. A., 106.

In *Banúpa Sundardas Jagjivandas*, I. L. R., 6 Bom., 333, the defendant admitted the execution of a deed of sale, but alleged that, contemporaneously with it, he entered into an oral agreement with the vendee that the deed was to be merely a security for the payment of a certain sum of money by the defendant to the vendee, and that a large portion of the sum so secured had already been paid to the vendee. On special appeal the High Court held that, as the alleged agreement was wholly inconsistent with the terms of the deed of sale, evidence to prove such agreement was excluded by this section. Upon the argument as to fraud, Westropp, C.J., observed as follows, (page 338), "The defendants do not contend that they supposed the deed of sale, when they executed it, to be other than what it purports to be; but they say it is modified by the contemporaneous oral agreement, and it has been argued for them that it is a fraud on the part of Haridás to treat the deed of sale as such; but that would not be a contemporaneous but a subsequent fraud, or rather a breach of the oral contract; and, if we were to hold that to be such fraud as is contemplated by the first proviso to Section 92, we should be rendering that section nugatory; for, in every case in which a party stood upon the written contract, and declined to act upon the alleged oral contract, fraud might be equally imputed, and the apparent object of the section,—viz., the discouragement of perjury—would be frustrated."

In Letters Patent Appeal 1953 of 1881, Garth, C. J. and Mitter, J., held that it was open to the parties to a document, purporting on the face of it to be an absolute conveyance, to show by the subsequent conduct of the parties and circumstances of the case, though not by direct evidence of a contemporaneous oral agreement, that it was merely a mortgage. They relied on a decision by West, J., *Daksu*

Lakshman v. Govinda Kanji, I. L. R., 4 Bom., 594 and a Full Bench Ruling of the Dungal Court in *Gasheenath Chatterjee v. Chundy Churn Banerji*, 5 W. R., 68. It was otherwise held in *Daimoddee Paik v. Kaim Taridar*, I. L. R., 5 Cal., 300; S. C., 4 Cal., 419. The Ruling in 1953 of 1881 was followed by Cunningham and McLean, J.J., in R. A. 2280 of 1881.

It seems that oral evidence is admissible to show that a written agreement is really a wagering contract, see *Anupchand Hemchand v. Champsi Ugerchand*, I. L. R., 12 Bom., 585 followed in *Eshoor Doss v. Venkatasubba Rau*, I. L. R., 17 Mad., 480. The earlier case of *Juggernaut Sciv Bux v. Rām Dytī* was decided in a sense contrary to this: but it seems plain that the effect of Proviso I, did not receive attention in that decision.

Fraud.—In *Kashinath Chukerbati v. Brondabun Chukerbati*, I. L. R., 10 Cal., 649, a defendant was allowed to show that a Kabuliat had been fraudulently executed with a view to enabling the plaintiff to obtain a higher price for the land, and that there had never been any intention that defendant should be paid under the Kabuliat. It was laid down by Garth, J. in *Cutts v. Brown*, I. L. R., 6 Cal., 328, at p. 338, that this proviso applied to cases where the contract was void on the ground of fraud, etc., in its inception, and not to cases where one of the parties attempts to make a fraudulent use of a valid agreement: see too *Banūpa v. Sundardas Raggivandas*, *post*, p. 266.

For cases in which a defendant was allowed to show that the consideration was different from that recited in the contract, see *Lal Hunmat Lahai v. Llewellen*, I. L. R., 11 Cal., 486. *Hakam Chand v. Hiralal*, I. L. R., 3 Bom., 159; *Vasudeva v. Narasamma*, I. L. R., 5 Mad., 6; *Kumara v. Srinivasa*, I. L. R., 11 Mad., 213; *Indarjit v. Lal Chand*, I. L. R., 18 All., 168.

Mistake.—So also extrinsic evidence is permissible to show that certain words in a contract must, from the circumstances of the case, have been inserted by mistake. Thus, where a charterparty was dated February 6th, and contained a covenant that a ship should sail on February 12th, evidence was admitted to show that in fact the charterparty was not signed till March 15th, and that, consequently, the stipulation as to the ship sailing on February 12th, could have formed no part of the contract; *Hall v. Cazenove*, 4 East., 477. Parol evidence is admissible to prove that a will was executed on a date other than that which appears upon the face of it; *Reffell v. Reffell*, L. R., 1 P. & D., 139.

But, where a codicil had been read over to a capable testatrix and duly attested by her, the Court refused to exclude from probate certain words inserted in it, which were not in accordance with

the instructions given by her to her solicitor, nor were contained in the draft codicil which had been read over to and approved by her, although such words were sworn by the solicitor who prepared the codicil to have been inserted without any instructions from her and by his inadvertence; *Guardhouse v. Blackburn*, L. R., 1 P. & D., 109. See judgment of Sir J. P. Wilde on the general principles regulating such matters, page 113, and *Fulton v. Andrew*, L. R., 7 H. L., 448.

In the Exchequer Chamber it has been held that, where a party had specially stipulated that he was acting as agent for another, and had signed as such agent for his absent principal named, he was at liberty to show, by way of equitable defence, that the agreement, which had been drawn up in such terms as to make him personally liable, was so written by mistake and did not express the real contract; *Wake v. Harrop*, 30 L. J., Ex., (N. S.) 273; 31 L. J., Ex., (N. S.) 451.

Similarly, in *Lyall v. Edwards*, 6 H. & N., 337, relief was given because the release in terms included more than the parties could have intended, inasmuch as one claim, covered by the terms of the release, had not come to the releasing party's knowledge. But where the parties know the effect of a document and strive to obviate that effect by a contemporaneous oral agreement, the written agreement can alone be looked to.

Where a broker by mistake entered in a sold note the name of a third party instead of that of the plaintiff as purchaser, and the mistake did not mislead the defendant, the plaintiff proved the contract from the particulars entered in the broker's book and the bought note, and the sold note was held not to be a bar to his right of action; *Mahomed Bhoj Puddumsee v. Chutterput Singh*, 1893, 20 Cal., 854.

In *Vorley v. Barrett*, 26 L. J., C. P., 1, an action against a surety, the defendant pleaded that the plaintiff had, without the defendant's consent, released the surety. To this it was replied that the agreement, by which it was alleged that the principal debtor was released, was worded by mistake so as to include the present claim, and that the plaintiff did not otherwise discharge the debtor, and that the true agreement was, in all respects, performed. This was held a good defence.

As to the circumstances under which mistake, fraud, want of capacity in a contracting party or want of consideration will avoid a contract, see Contract Act IX of 1872, Sections 20—22.

A man cannot both approbate and reprobate the same transaction.—A party impugning a document cannot affirm one part of the transaction and disaffirm the rest. "The rules of evidence, and the law of estoppel," it was observed by the Privy Council, in *Shah*

Makhum Lall v. Baboo Sree Kishen Singh, 12 Moore's I. A., 157, "forbid any addition to, or variation from, deeds or written contracts. The law, however, furnishes exceptions to its own salutary protection; one of which is, when one party, for the advancement of justice, is permitted to remove the blind which hides the real transaction; as for instance, in cases of fraud, illegality, and redemption, in such cases the maxim applies that a man cannot both affirm and disaffirm the same transaction, show its true nature for its own relief, and insist on its apparent character to prejudice his adversary. This principle, so just and reasonable in itself, and often expressed in the terms that you cannot both approbate and reprobate the same transaction, has been applied by their Lordships in this Committee to the consideration of Indian appeals, as one applicable also in the Courts of that country, which are to administer justice according to equity and good conscience. The maxim is founded not so much on any positive law as on the broad and universally applicable principles of justice. The case of *Forbes v. Ameeoonissa Begam*, 10 Moore's I. A., 356, furnishes one instance of this doctrine having been so applied, where it is said in the judgment of their Lordships:—'The respondent cannot both repudiate the obligations of the lease, and claim the benefit of it.'"

The effect of this proviso and Illustration (e) is somewhat to extend the rule of the English Courts of Equity, according to which a suitor asking for specific performance cannot set up the plea that part of the agreement was inserted by mistake, though a defendant, resisting specific performance, could do so.

(4) **When separate oral agreement may be proved.** The ground on which, in certain cases, evidence of a separate oral agreement may be admitted, is that the written agreement did not, and was not intended to include the entire contract; oral evidence may then be given of those parts of it, for which the document did not provide; *Guddalur Ruthna Mudaliyar v. Kunnattur Arumuga Mudaliyar*, 7 M. H. C. R., 189. In *Ahrey v. Crur*, L. R. 5 C. P. 37, to an action by the payee against the drawer of a bill of exchange, payable twelve months after date the defendant pleaded that he drew the bill and delivered it to the plaintiff for the accommodation of the acceptor and as surety for him; that, at the time the defendant so drew and delivered the bill to the plaintiff, it was agreed between the plaintiff and defendant and the acceptor that the acceptor should deposit with the plaintiff certain securities, to be held by the plaintiff as security for the due payment of the bill, and that, in case the bill should not be duly paid, the plaintiff should sell the securities and apply the proceeds in liquidation of the bill, and that, until the plaintiff should have so sold the securities, the defendant should not be liable to be sued

on the bill. The plea then went on to aver that the securities were deposited with the plaintiff by the acceptor, but that the plaintiff had not sold but still held them. It was held, that oral evidence of the agreement alleged in the plea was not admissible, inasmuch as it contradicted or varied the express written contract on the face of the bill.

In *Ram Baksh v. Durgan*, I. L. R., 9 All., 392, oral evidence to show the provision made for the means by which instalments due under a bond were to be paid was held admissible on the ground that it did not detract from, add to, or vary the original agreement. In *Antee Singh v. Ajudhia Sahu*, I. L. R., 9 All., 249, oral evidence was admitted to show that the plaintiff who was entitled to interest under a bond had agreed in a subsequent Janmog to take rents instead. Evidence has been admitted under proviso (2) to show that an agreement had been made that part of the consideration due under a deed of putowa was to be returned; *Lala Himmat Sahai Singh v. Llewellyn*, I. L. R., 11 Cal., 486.

In another case *Hill v. Wilson*, L. R. 8 Ch. 888, A being sued on a promissory note, set up the story, that his wife's uncle, having lent him £500 and intending to deduct it from the legacy which he intended to leave to the defendant's wife at his death, allowed the defendant meanwhile to pay interest at £1 per cent. and the promissory note was drawn to effect this object and was not intended to be enforced. This evidence was held not to be admissible.

Sometimes, oral evidence is necessary in order to show the moment at which a document becomes a contract. Thus, in *Stewart v. Eddowes*, *Hudson v. Stewart*, L. R. 9 C. P. 311, Messrs. Eddowes, who were shipbrokers, were acting on behalf of the vendors of a ship to Stewart, the plaintiff. A memorandum, containing suggested terms for the sale of the ship, was submitted by Messrs. Eddowes to Stewart, and the latter, making certain alterations in it, signed it and took it to one of the Eddowes for approval. Eddowes made certain other alterations in it, submitted it to the owners of the ship for their approval, who again made certain other alterations in it, and sent it to Messrs. Eddowes, Messrs. Eddowes signed it on behalf of the owners and took it to Stewart, who acquiesced in the alterations made by the owners, and agreed to abide by the terms of the contract as signed by Messrs. Eddowes. An action having been brought on the contract, the counsel for Stewart objected to the reception of parol evidence to show that Stewart had acquiesced in the alterations made subsequent to his first signing the contract, on the ground that its effect was to vary a written contract. It was held that this evidence was admissible, as there never had been a contract between the parties until the last act of assent on Stewart's part; and the effect of the parol evidence was not to vary a written contract, but merely to

show what the condition of the document was when it became a binding contract between the parties.

The rule laid down in this proviso was exemplified in a case where plaintiff had lent money to defendant and there was an entry in plaintiff's book of the amount of the loan and the rate, but not as to date of repayment, evidence was held to be admissible of a contemporaneous oral agreement as to the time of repayment; *Behary Lall Dey v. Kaminee Sonduree*, 14 Suth. W. R., (C.R.).. 320.

So also where a promissory note is silent as to interest, a verbal agreement, made subsequent to the execution of the note, to pay interest may be proved under clause 2 of Section 92 of the Evidence Act; *Sowdāmonee Debye v. A. Spalding*, 12 Cal., 163.

The intention of the parties that the writing should not contain the whole agreement between them may, says Mr. Leake (page 103), be shown by direct evidence, or inferred from the informality of the document.

An oral agreement inconsistent with the terms of a written lease is not admissible; *Ebrahim Pir Mahomed v. Ursetji de Vitre*, I. L. R., 11 Bom., 644.

Question whether transaction is a conveyance or mortgage.—It often happens, that the parties to a conveyance, purporting on its face to be a purchase-deed, seek to enforce it as a mortgage. This a Court of Equity can do. "That this Court," said Lord Cottenham in a case of this nature, "will treat a transaction as a mortgage, although it was made so as to bear the appearance of an absolute sale, if it appear that the parties intended it to be a mortgage, is, no doubt, true; but it is equally clear that, if the parties intended an absolute sale, a contemporaneous agreement for a re-purchase, not acted upon, will not, of itself, entitle the vendors to redeem;" *Williams v. Owen*, 5 My. & Cr., 303.—"Where difficulty," it is observed in the notes to *Howard v. Harris*, 2 White and Tudor, L. C., at page 29, (7th Edn.), "arises in determining whether a conveyance is intended to be a mortgage or not, parol evidence will be admitted to show that what appears on the face of it to be an absolute conveyance, was intended to be a conveyance by way of mortgage only. Thus, in *Maxwell v. Montacute*, Prec. Ch. 326, where a person refused to execute according to agreement a defeasance, after the mortgagor had executed an absolute conveyance, Lord Nottingham admitted parol evidence to show the agreement, and decreed against the mortgagee."

In *Bholonath Khattri v. Kaliprasad Agurwalla*, 8 B. L. R., 89, Paul, J., overruling a decision of the Full Bench, and relying on *Muttylall Seal v. Anund Chunder Sandel*, 5 Moore's I. A., 72, held that evidence was admissible to prove that a conveyance of lease and

release was in the nature of a mortgage, with a power of redemption. Paul, J., pointed out that there were instances in which the parties agree that a document shall be executed *not embodying* all the terms by which they are to be bound; and in such cases it cannot be said that the *terms of the contract have been reduced to writing*. In *Banāpa v. Sundardas Raggivandas*, I. L. R., 1 Bom., 333, the defendant admitted the execution of a deed of sale, but alleged that, contemporaneously with it, he entered into an oral agreement with the vendee that the deed was to be merely a security for the payment of a certain sum of money by the defendant to the vendee, and that a large portion of the sum so secured had already been paid to the vendee. In delivering the judgment of the Court, Westrop, C.J., observed (page) 338,—“There would appear to have been some conflicting decisions on the state of the law on such a point before the Indian Evidence Act came into force—see *cr gr.*, *Dada Honāji v. Babāji Jagushet*, 2 Bom. H. C. Rep., 36; *Gudalur Ruthna Mudaliyar v. Kunnattur*, 7 M. H. C. Rep., 189; and *Bholanath Kettri v. Kaliprasad Agurwalla*, 8 B. L. R., 89, on the one side and the Full Bench case, *Kasheenath Chatterjee v. Chundey Churn Banerjee*, 5 Cal. W. R. [C. R.,] 68, and the authorities there cited. It is unnecessary for us to give any opinion as to which of these decisions was right, inasmuch as we think that such cases as the present were those in which the Legislature, by Section 92 of the Indian Evidence Act, intended to exclude evidence of oral agreements contemporaneous and inconsistent with written agreements. The circumstances in the case of *Muttylall Seal v. Anund Chunder Sandel*, 5 Moore's I. A., 72, were very special. There were a bond and warrant of attorney to confess judgment, with a defeasance thereupon indorsed, prior to the release, and lease of even date with the release, which tended to show that the release, though absolute in form, was intended to be a mortgage, which prevent that case from being applicable on the present occasion where all those circumstances are absent.”

In accordance with the foregoing principles Peacock, C. J., laid down that, although mere verbal evidence was inadmissible to contradict a written contract, yet the real intention of the parties to it, as to whether a sale should be absolute or conditional, must be gathered from the collateral circumstances of the case; *Kashunath Chatterjee v. Chundey Churn Banerjee*, *supra*. In *Hem Chunder Soor v. Kally Churn Das*, I. L. S., 9 Cal., 541, it was held that the rule laid down in this case had not been modified by Section 92 of the Evidence Act; and the principles are explained on which the Court will look to surrounding circumstances and the acts and conduct of the parties in order to ascertain whether a document which appears on the face of it to be an absolute sale, was intended to be, and in

fact was, treated by the parties as a conditional sale only. Where the subsequent conduct of the parties has been such as to indicate that the original transaction, though, on the face of it, a sale was really a mortgage, the Court will not only consider that subsequent conduct, but, when it considers the transaction to have been a mortgage, will admit parol evidence of the original agreement in order to ascertain the terms of the mortgage: *Bakshi Lakshman v. Gorindā Kanji*, I. L. R., 4 Bom., 594. The Judges explain at page 597, that subsequent conduct may easily constitute an estoppel, as to which see Section 115;—and, even when it does not, it ought to be considered in construing the contract. See too *Kashenath Das v. Harrihur Mookerjee*, I. L. R., 9 Cal., 898; *Venkatratnam v. Reddiah*, I. L. R., 3 Mad., 494 and *Iakken v. Alagappudayan*, I. L. R., 16 Mad., 80; also *Kader Moideen v. Nepean*, L. R., 20 I. A., 96. For an application of the rule to the question of penalty or liquidated damages, see *Behary Loll Doss v. Tej Narain*, I. L. R., 10 Cal., 764. The English rule of equity is explained, and the Judges state the grounds on which they hold the ruling of Jackson, J., in *Damodoe Paik v. Kani Tandar*, I. L. R., 5 Cal., 300, excluding evidence of conduct in such cases, to be erroneous. The Judicial Committee of the Privy Council have decided that trusts may often exist, not reduced to writing, which the Courts will recognize; *Mussumat Thukrain Sookraj Koowar v. The Government*, 14 Moore, I. A. 112.

Under the present proviso the Courts will have to consider; (1) whether the matter is one about which the document is silent; (2) whether the alleged contemporaneous agreement is inconsistent with the provisions of the document, and (3) whether the formality of the document renders it improbable, or its informality renders it probable that the parties did not intend to express the whole of their intentions in it. Of course, the more formal the document, the greater is the probability that the parties intended it to comprise the entire transaction, and the greater, consequently, will be the Court's reluctance to let in oral evidence of a separate agreement. This is shown by the two cases in Illustration (h). So, with regard to Illustration (i), if there is a regular written contract of sale, so framed as, apparently, to cover the entire transaction, oral evidence of a warranty or of a representation that the goods were of a particular quality, would be rejected; *Harnor v. Groves*, 24 L. J., C. P., 58. So, where a tenant occupied premises under a written agreement, parol evidence of an understanding between the parties that the rent should commence from a later date than that mentioned in the agreement, was refused; *Henson v. Coope*, 3 Scott, N. R., 48. In *Moran v. Mittu Bibee*, I. L. R., 2 Cal., 58, a deed of mortgage, between A as mortgagor and B and C as mortgagees, provided amongst other things that B and C should have

a first charge upon indigo, to be manufactured, in respect of the moneys secured thereby; that the indigo should be sold subject to B and C's direction; that, until the debt was paid, A should have no power to transfer, sell, or mortgage the properties thereby mortgaged, or in any way to deal with the sale proceeds of the manufactured indigo. B and C were purdani-shins and D was their agent, and as such was the only medium of communication between them and A as to the further advances required by A. A alleged that D told him that B and C were unable to make further advances, and that A could obtain them on the usual terms from the plaintiffs. The husband of B and C during his lifetime held similar mortgages to secure advances made by him. Such advances had, with the mortgagee's knowledge, been supplemented by loans obtained from the plaintiffs on the security of a first charge upon the crop to the extent of such loans. It was alleged by A that it was upon the understanding that the same course was to be followed in the present instance, that the mortgage deed to B and C was executed. A obtained advances from the plaintiffs upon giving them a first charge on the indigo to be manufactured in the season. A stated that without such advances he could not have manufactured any indigo whatever that season. The indigo when manufactured, was claimed by B and C under their mortgage; and their claim being resisted by A, who set up the plaintiff's rights, B and C brought a suit to enforce the provisions of their mortgage deed. The plaintiffs now sued A, B and C and the holders for sale, to establish their first charge. The Court held that the alleged oral agreement between A and D as to obtaining loans, if necessary, from the plaintiffs and giving them a first charge on the seasons indigo in respect of such loans was in contravention of the mortgage deed to B and C and was, therefore, inadmissible under this section. The Chief Justice, after referring to *Pickard v. Sears*, 6 A. & M., 469, and *Gaimcross v. Lorimer*, 3 Macq. H. L. C., 829, said (page 92), that "in order to defeat and override an engagement as solemn and distinct as that of the mortgage to the Mussamuts," [A, B and C] "the evidence that they either themselves, or through their agents were perfectly aware, not only that the advances were being made by the plaintiffs, but of the amount of those advances and of the terms upon which they were made, should be clear and unmistakable." But a mere informal memorandum will not have the same effect. Thus the following memorandum of the hire of a horse, "six weeks at two guineas, W. H.," was held not to exclude evidence of a contract that all accidents occasioned by the horse's shying, should be at the risk of the hirer. But the separate oral agreement must not be inconsistent with the terms of the written one: thus, the acceptor of a bill of exchange cannot set up a paid contract inconsistent with the contract

on the face of the bill, *e.g.*, and an acceptor cannot show that a bill was given by way of security for the repayment of a debt which was agreed to be paid in instalments: *Besant v. Cross*, 20 L. J., C. P., 173.

So, again, where a bond is conditioned for payment absolutely, the defendant will not be allowed to show that there was an agreement, that the bond should operate merely as an indemnity: nor, when a note was, on the face of it, payable on a day certain, to show an oral agreement that it should be payable on a contingency, or that it should not be paid but be renewed. And so, where a promissory note is in its terms a joint note one of the parties cannot show that he is a surety only. This rule however will not preclude a party from availing himself of any equities to which the circumstances of the case give rise and it has been held inapplicable to a case where a money lender has made advances on the security of a joint and several note, being well aware at the time that one of its makers was a surety; *Greenough v. McCulland, Taylor*, § 1153, 9th edition, p. 758; 30 L. J., Q. B., 15. When a person has signed as principal, he cannot show that he was merely an agent.

So, when a policy of insurance was on an adventure from Archangel to Leghorn, evidence was not allowed to be given of a parol agreement that the risk should commence at a shorter point.

In *Morgan v. Griffith*, L. R., 6 Ex., 70, the plaintiff had agreed to hire certain grass land of the defendant, and had refused to sign the lease unless the defendant, would promise to destroy the rabbits. The defendant refused to put a term to this effect in the lease, but promised orally to destroy them. The plaintiff afterwards sued for the failure to destroy. It was held that the oral agreement was collateral to the lease and that evidence of it was properly admitted. See also *Angell v. Duke*, L. R., 10 Q. B., 174, and the notes to Section 91.

(5) Separate oral agreement constituting a condition precedent may be proved.—This important proviso is an extension of the last. Thus, “it may be shown by parol evidence that an instrument, apparently executed as a deed, had really been delivered simply as an escrow, or that a document, was really meant to be conditional on the happening of an event, which had never occurred.”—*Tayl.*, § 1135. For instance, where a bond recited the receipt of Rupees 200 and promised interest and repayment on demand, the defendant proposed to show by oral evidence that the real consideration for the bond was not the Rupees 200, but the plaintiff’s abstinence from preventing the defendant negotiating another loan, and that the plaintiff did not so abstain: it was held that the defendant was at liberty to give evidence of the alleged verbal agreement, as, if the defendant’s statement was true, the agreement was that the bond should become binding only in

certain events, which had not happened; and the agreement had, accordingly, never become binding on the defendant; *Annagurubala Chetti v. Kristnaswami Nayakkan*, 1 M. H. C. R., 457. See also *Pym v. Campbell*, 6 E. & B., 370, cited in the notes to Section 91.

Where a promissory note absolute in its terms was given, but it was orally agreed that it was not to be enforced by suit till the happening of a certain event, it was held not to fall within cl. 3 of this section; for the agreement was not that the note should have no effect, but that the legal obligation to perform the promisor's promise should be postponed, till the happening of the event; *Ramjibun Serowgy v. Oghore Nath Chatterjee*, I. L. R., 25 Cal., 401.

So the omission of a provision as to interest in a *hathchitta* would not preclude evidence of an agreement for interest; *Umesh Chunder Baney v. Mohene Mohun Das*, I. L. R., 9 Cal., 301.

A question has been raised whether the words "condition precedent to the attaching of any obligation under any such contract" mean a "condition precedent to the contract being of any force or validity" or a "condition precedent to some particular obligation contained in the contract being of force or validity," as *e.g.*, a provision that certain instalments should not be paid till a certain debt had been paid. Garth, C. J., held the latter, *viz.*, that, till the condition was performed, there was, in fact, no contract at all; but where the contract had in fact become binding and had in part been performed, it was not permissible to show that some particular provision in the written contract was subject to an oral condition precedent; *Jugtanund Misser v. Nerglan Singh*, I. L. R., 6 Cal., 433. See *Jadu Rai v. Bhubataran Nundy*, I. L. R., 17 Cal., 173, p. 254 *ante*.

(6) Proviso (4) is no exception to the rule laid down in the section. It merely points out that a written contract may be modified or rescinded by a subsequent oral contract, except in cases where the contract is obliged by law to be writing, or has been registered. As to the first of these cases, regard must be had to the numerous classes of contracts which, under the Transfer of Property Act, 1882, can be effected only by a document. In none of these cases could evidence of a subsequent oral contract, modifying the terms of the document, be admitted.

In *Rakhmabai v. Tukaram*, I. L. R., 11 Bom., 47, an oral agreement cancelling a registered deed of sale was set up by the defendant and admitted on the ground that the object of the oral agreement was not to rescind the original transaction, but to transfer any rights acquired by the plaintiff to the defendant and was an entirely new transaction. See *Antu Singh v. Ajudhia Sahu*, I. L. R., 9 All., 249.

(7) **When usage or custom by which incidents are usually annexed to written contract may be proved.**—As to this subject generally see the notes to *Wigglesworth v. Dullison*, 1 Smith's L. C. 528. Where a written instrument provided for a joint-tenancy and joint-contract, by all the parties executing it, to pay the whole rent of the village without any reference to the quantity of land held by each, it was held that oral evidence was not admissible to show separate specific contracts imposing a several liability on each according to the amount of land held by him: and that it made no difference that the evidence was put forward as evidence of a custom; *Morris v. Panchanada Pillay*, 5 M. H. C. R., 135.

"Inconsistent."—The meaning of this term as used in reference to this subject, and the reasons for admitting evidence of usage in such cases, were thus explained by Lord Campbell, C. J., in *Humphrey v. Dale*, 7 E. & B., 266. In that case linseed oil had been purchased through London brokers, by bought and sold notes, and the name of the purchaser was not disclosed in the bought note. Evidence was received of a usage of trade in the City, by which every buying broker, who did not at the time of the bargain name his principal, rendered himself liable to be treated as the purchaser by the vendor. "In a certain sense," observed Lord Campbell, (page 274) "every material incident which is added to a written contract, varies it, makes it different from what it appeared to be, and so far is inconsistent with it. If, by the side of the written contract *without*, you write the same contract *with* the added incident, the two would seem to import different obligations, and to be different contracts. To take a familiar instance by way of illustration: on the face of a bill of exchange at three months after date the acceptor would be taken to bind himself to the payment precisely at the end of the three months; but by the custom, he is only bound to do so at the end of the days of grace, which vary, according to the country in which the bill is made payable, from three up to fifteen. The truth is that the principle on which the evidence is admissible is that the parties have not set down on paper the whole of their contract in all its terms, but those only which were necessary to be determined in the particular case by specific agreement, and which of course might vary infinitely, leaving to implication and tacit understanding all those general and unvarying incidents which a uniform usage would annex, and according to which they must in reason be understood to contract unless they expressly exclude them. To fall within the exception, therefore, of repugnancy, the incident must be such as, *if expressed in the written contract*, would make it insensible or inconsistent. Thus, to warrant bacon to be *prime singed*, adding 'that is to say *slightly tainted*,' as in *Yates v. Pym*, 6 Taunton, 446 (as to which however see *Myers v. Sarl*, 30

L. J. Q. B. 9), or to insure *all the* boats of a ship and add 'that is to say *all not slung in the quarter*,' as in *Blackett v. Royal Exchange Assurance Company*, 2 C. & J., 244, and other cases, of the same sort scattered through the books, would be instances of contracts in which both the two parts could not have full effect given to them if written down; and, therefore, when one part only is expressed, it would be unreasonable to suppose that the parties intended to include the other also. Without repeating ourselves, it will be found that the same reasoning applies when the evidence is used to explain a latent ambiguity of language.....Merchants and traders, with a multiplicity of transactions pressing on them, and moving in a narrow circle, and meeting each other daily, desire to write little and leave unwritten what they take for granted in every contract. In spite of the lamentations of Judges, they will continue to do so; and in a vast majority of cases, of which the Courts of law hear nothing, they do so without loss or inconvenience; and, upon the whole, they find this mode of dealing advantageous, even at the risk of occasional litigation. It is the business of Courts reasonably so to shape their rules of evidence as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them. It cannot be doubted, in the present case, that *in fact* this contract was made with the usage understood to be a term in it; to exclude the usage is to exclude a material term of the contract. and must lead to an unjust decision."

Where an usage conflicts with the expressed intention of the document, the latter must be followed: thus, where, in an agreement between an African Merchant and an African Captain, the latter was to have a commission of "£6 per cent. on the *net proceeds of the homeward cargo*, after deducting the usual charges" parol evidence was not admitted to show that, according to the course of trade between African Captains and Merchants, the Captain was entitled to a commission on the *whole amount for which the cargo had been sold*, and not merely the net profits; *Laine v. Horsfall*, 3 C. & K. 349.

So, also, where A contracted to deliver to B 2,000 maunds of fresh, clean and good up-country indigo, guaranteed growth of season 1870-1, A was not allowed to prove a custom of mixing seeds of two crops so as to bring up the sample to an average quality, as this would be distinctly at variance with the terms of the contract; *Macfarlane v. Carr*, 8 B. L. R., 459.

In *Spartali v. Benecke*, 19 L. J., C. P., 293, there was a sale of goods at a specified price, "to be paid for by cash in one month, less 5 per cent. discount," it was held that evidence could not be given of

an usage of trade, by which vendors in such contracts were not bound to deliver without payment; such an usage being inconsistent with the terms of the contract. This judgment must, however, be considered as over-ruled by *Field v. Lelean*, 30 L. J., Ex., 168, subsequently decided in the Exchequer Chamber. In that case the contract was "Bought—250 shares, at £2.5s. per share. £562-10s. for payment, half in two, half in four months:" it was held that parol evidence of a custom among dealers in such shares, that delivery should take place concurrently with payment, was admissible.

So also, the drawers of a hundi in favor of plaintiff at Dacca, where all parties to the hundi lived, were not held liable, on proof that they were the gomastas of the acceptor, had no interest in the hundi, and that, according to the custom of Dacca, where the hundi was drawn and accepted, agents are not, under such circumstances, liable, though the agency does not appear on the hundi; *Hazari Mull Nahatta v. Sobagh Mull Duddha*, 9 B. L. R., 1.

The English Courts have held that, where there is a usage or custom of trade, the intention of the parties to exclude a contract from its operation must be shown by the contract itself, and cannot be proved by other evidence. Thus, where there was a sale of rum, no mention being made of warehouse rent, evidence was admitted that, by custom of trade, an allowance for warehouse rent was incorporated in such contracts; but evidence that the parties had orally agreed to make an allowance different from the customary one, was refused; *Fawkes v. Lamb*, 31 L. J., Q. B., 98.

In *Hutchinson v. Tatham*, L. R., 8 C. P., 482, the defendants, who signed "as agents to merchants," were held liable under a custom that, if the principals' name were not disclosed in reasonable time, the agents should be liable. See also *Fleet v. Murton*, 7 Q. B., 126, and *Pike v. Ongley*, 18 Q. B. D. 708.

As to the "usage" which may be proved as adding an incident to a written contract, "there needs not either the antiquity, the uniformity or the notoriety of 'custom,' which in respect of all these becomes a local law. The usage may be still in the course of growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into the contract;" *Juggomohun Ghose v. Manickchand*, 7 Moore's I. A., 263, at page 282.

In *Gopeekrist Gosain v. Gungapersaud Gosain*, 6 Moore's I. A., 58, the Privy Council laid down that benami transactions are to be

regarded as a recognised system amongst Hindus. In *Dowsett v. Kedarnath*, 7 B. L. R., 720, the Bengal High Court held that a tenant was not estopped from alleging that the landlord was only a benami holder and had therefore no title. See notes to Section 116. Speaking of *Benami* transactions, Jackson, J., observed in *Bipinbehari Chowdry v. Ramachandra Roy*, 5 B. L. R., 284, at page 248: "In this very large class of cases, it seems to me that the rule in regard to the admission of parol evidence to vary written contracts will not apply; and I conceive that the decisions, refusing to allow an agent, who enters into a written contract, in which he appears as principal, to offer parol evidence for the purpose of exonerating himself are wholly wide of the case before us.....The principle of one of the common forms of *benami* contract in this country is that A contracts with B, though by the desire and for the convenience of one or other of those parties the name of C is used instead of the name of that party. It is clear that, in such a case, C did not contract at all. He was not the agent for either, but was, and is, a stranger to the whole business."

In an action against the drawer of a bill of exchange, drawn and endorsed in England, and payable abroad, and dishonoured, evidence is not admissible to prove a usage among merchants in England to entitle the holder, at his option, to demand from the drawer the amount of re-exchange, or the sum which he gave for the purchase of the bill; this being a usage which in terms contradicts the written instrument; *Suse v. Pompe*, 30 L. J., C. P., 75.

(8.) **Any fact may be proved which shows in what manner the language of a document is related to existing facts.**—Under this proviso, it is apprehended, evidence might be given as to what did, as a fact, pass by a deed, the language of which is susceptible, with equal propriety, of two constructions. For instance, where premises, were leased, including a yard described by metes and bounds, and the question was whether a cellar under the yard was or was not included in the lease, oral evidence was admitted that at the time of the lease, the cellar was in the occupancy of another tenant, and so could not have been intended to pass by the lease; *Doe d. Freeland v. Burt*, 1 T. R., 701. Thus, also, where an admission in writing is necessary, it does not follow that the document must be conclusive by itself, or that nothing beyond the document can be looked at to determine the subject of the admission. Thus, in *Padmanabhan Numbudri v. Kunhi Kolendan*, 5 Mad. H. C. Rep., 320, the plaintiffs, who sued to redeem land mortgaged to the defendant, relied upon a document as containing an acknowledgment of the plaintiffs' title under Section 15 of the Limitation Act, XIV of 1859.

The document contained an admission by the defendant that he held the land upon mortgage in a specified district from the temple of which the plaintiffs were the trustees. The Court held that oral evidence was admissible to apply the document to the land to which it was intended to refer. A general hypothecation is, however, too indefinite to be acted upon; *Ram Bukal v. Sookh Deo*, H. C. Rep. (N. W. P.) 1869, p. 65. See also *Deajit v. Pitambar*, 1 I. L. R., (All.) 275, cited in the notes to Section 93.

So, where in an answer to a letter by mortgagor's agent, desiring to see the mortgagee on the subject of his claims on the property, the document, relied on as an acknowledgment of the mortgagor's title, was merely "Sir, I received yours of the 2nd instant, I do not see the use of a meeting unless some party is ready with the money to pay me;" this was held a sufficient acknowledgment of the mortgagor's title to redeem. So, in another case it was laid down "that the Court, being in possession of the circumstances of the case, must construe the letter in the way in which the writer intended it to be construed by the person to whom it was addressed."

A pottah is a generic term, embracing every kind of engagement between a Zemindar and his tenants or ryots. If the pottah does not contain the term "Moccurrey," or equivalent words of limitation, as "from generation to generation," it is not *prima facie* to be assumed to grant a Moccurrey-istimrari, or perpetual tenure; but evidence of long uninterrupted enjoyment, at a fixed unvarying rent, will supply the want of words of limitation in such pottah.

Where, therefore, a pottah, dated 1792, was granted to the predecessor in title of A by the predecessor in title of B, addressed to him as Moostager or farmer, without any words of limitation, and the property comprised in the pottah remained in the uninterrupted possession of the lessee and his successor at a fixed rent up to the year 1861, it was held, that such long and uninterrupted possession conferred a sufficient title to defeat the right of the then landlord to an enhancement of rent under the provisions of Act No. X of 1859; *Baboo Dhunput Singh v. Gooman Singh & others*, 11 Moore's I. A., 433.

Under the Limitation Act, XV of 1877, an acknowledgment may be sufficient for the purpose of Section 19, though it is undated, and though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform, or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property

or right. Extrinsic evidence will be admissible to establish the points omitted. See also *Unesh Chandra Mookerjee v. E. Sageman*, 5 B. L. R., 688, note (4) as to evidence to identify a note.

So, also, where in a deed of arrangement between the members of a Hindu family and the childless widow of one of the co-heirs, in respect of a certain joint estate, the widow was declared entitled to a certain sum, as the share of her deceased husband, "for her sole absolute use and benefit," it was held that the words were not to be interpreted as creating a separate estate in the widow; but that the deed must be construed with reference to the situation of the parties and the rights of the widow by the Hindu law; and that as she claimed and received the money as her husband's share in the joint-property, as his heiress and legal representative, the words meant only that the property was to be held by her in severalty from the joint estate, and that, as a Hindu widow, she took only a life-interest; *Sreemutty Rabutty Dossee v. Sibchunder Mullick*, 6 Moore's I. A., 1: see also *Mussumat Bhasbutti Dau v. Bholanath Thakoor*, L. R., 2 I. A., 256; and *Ghellabhal v. Nandubai*, I. L. R., 21 Bom., 835.

Where wool had been purchased by letter, the one party offering to purchase "*your wool 16s. per stone*," and the other party accepting the offer, evidence was admitted as to the *quantity* of wool to which the contract applied. "It is quite clear," said Campbell, C. J., "that by the letter of the 5th of September, which was answered by that of the 8th of September, there was a contract entered into between the plaintiffs and the defendant, by his agent. There was an offer of 16s. per stone made to the plaintiffs for "*your wool*," to be delivered in Liverpool: and that offer was accepted. We need not regard any particularity about the Statute of Frauds; there was a written contract contained in a letter which was written by Stewart, and answered by the plaintiffs. The only question is, what was the subject-matter of that contract; that subject-matter was "*your wool*" that is to say, wool which the plaintiffs had in their possession; and I am of opinion that when there is a contract for the sale of a specific subject-matter, parol evidence may be received to show what the nature of that subject-matter was: and that, in effect, may be by proving what was in the knowledge of the parties at the time of the contract being made;" *Macdonald v. Longbottom*, 28 L. J., Q. B., 298.

So, also, where a firm had employed a traveller to solicit custom for them over certain districts, and sued him on a written contract, for travelling in other districts and soliciting business for other firms, evidence was admitted to show the meaning of the words, "*your employ*" and "*the ground*" over which the defendant was to travel. Erle, C. J., said, "I am further clearly of opinion that the parol

evidence. which was objected to, is admissible, for the purpose of ascertaining the subject-matter to which to *apply* the contract. It was not tendered or admitted, for the purpose of varying the contract itself, or of varying the sense of the words used, but for the purpose of showing what the circumstances were under which such wide words were used and of applying those wide words to the circumstances." Byles, J., observed—"Then as to the reception of the parol evidence. I am of opinion that it was properly received, and that if it had been rejected, much inconvenience would have resulted.....For, without the parol evidence, very difficult questions might have arisen on this contract, inasmuch as it does not appear upon the face of it what the nature of the employment was, nor what the ground over which the defendant was to travel, and the parol evidence was given to identify the subject-matter of the contract in these particulars, and to apply it. It was just one of those cases in which parol, or rather extrinsic evidence, was admissible; for, the moment it appears that the vacancy in the employment which the defendant was to fill was that of traveller, the employment is identified; and the moment it appears that the district in which the vacancy had occurred was the Midland journey, the ground over which he is to travel is identified. It is a matter of every-day occurrence, in construing a will, for the Court to enquire into extrinsic circumstances, to ascertain the intention of the testator;" *Mumford v. Gething*, 29 L. J., C. P., 105.

So, also, where there is a written contract to keep premises in repair, evidence may be given as to the condition, age, &c., of the premises in calculating the repairs contracted to be done; *Payne v. Haine*, 16 M. & W., 541. So, again, where delivery of goods or other performance is to take place within a "reasonable" time, evidence of the circumstances of the case is admissible to show what was reasonable; *Ellis v. Thompson*, 3 M. & W., 445. Extrinsic evidence is sometimes admissible for the purpose of showing that what is ostensibly recoverable on a document is not really recoverable. Thus, where bills of exchange were drawn against goods sold, and the bill of lading deposited as security that the bills of exchange should be duly met; on the bills being dishonored, the holders sold the goods, and claimed against the defendant's estate the whole amount recoverable on the bills of exchange. Evidence was admitted to show the circumstances under which the bills were given, and that the holders were entitled to claim only the balance due after sale of the goods; *In re Shibchan-dra Mullick*, 8 B. L. R., 80.

In regard to wills, again, the verbal and written declarations or statements made by a testator in and about the making of his will, when accompanying acts done by him in relation to the same subject,

are admissible as evidence of the contents of the will; *Johnson v. Lyford*, L. R., 1 P. & D., 546.

For the rule of interpretation in will cases, where the context shows that certain words are not used in their ordinary sense, or where the use of them in their ordinary sense would lead to some manifest absurdity or incongruity, see *Thellusson v. Rendlesham*, 7 H. L. 429. Also *R. v. Ringstead*, 1 B. & C., 218, where it is laid down that, in furtherance of the manifest intention of the testator, general words which, taken in their ordinary grammatical sense, apply to the whole property devised, may be taken distributively, and that, *reddendo singula singulis*, they may be applied to that part of the property, to which they appear by the context to be applicable, so as to suffer other property, to which in their grammatical sense they would apply, to pass immediately. See also *Rhodes v. Rhodes*, 7 App. Cas., 192, in which the Judicial Committee struck out the words "from and after the decease of my said wife without leaving issue of the said marriage," which were shown to have been inserted accidentally and had the effect of frustrating the testator's manifest intentions.

Exclusion or evidence to explain or amend ambiguous document.

93. When the language used in a document is, on its face, ambiguous or defective,⁽¹⁾ evidence may not be given of facts which would show its meaning or supply its defects.⁽²⁾

Illustrations.

(a) A agrees in writing to sell a horse to B for 'Rs. 1,000 or Rs. 1,500'

Evidence cannot be given to show which price was to be given.

(b) A deed contains blanks. Evidence cannot be given of facts which would show how they were meant to be filled.

Note.

(1) **Patent ambiguity cannot be cleared up by extrinsic evidence.**—The expression "on its face, ambiguous or defective" has reference to the rule of English law which allows of extrinsic evidence for the purpose of clearing up a latent, but not for the purpose of clearing up a patent ambiguity. The rule is thus stated by Lord Bacon, (Bac. Max. of the Law, Reg. 25) "There be two sorts of ambiguities of words, the one is *ambiguitas patens* and the other *latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument: *latens* is that which seemeth certain and without ambiguity for anything which

appeareth on the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity. *Ambiguitas patens* is never holden by averment, and the reason is because the Law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averments, and so, in effect, to pass that without deed which the law appointeth shall not pass but by deed." The present section deals with patent ambiguities and enforces the rule laid down by Lord Bacon: Sections 95, 96 and 97 with latent ambiguities, that is, with difficulties which arise not on the face of the instrument, but in its application to the facts of the case, as, for instance, if a man devise "to his son John," when he has two sons of that name, *Fleming v. Fleming*, 1 H. & C., 242, or "to the eldest son of J. S." and there are, owing to a second marriage, two persons who answer to this description; *Smith v. Jeffryes*, 15 M. & W., 561.

(2) **When extrinsic evidence is admissible.**—The present section is not intended to have the effect of excluding evidence to explain abbreviations, illegible words, obsolete or provincial expressions, &c., which may, in one sense, be said to be "ambiguous or defective language," as to which see Section 98. It applies to cases (1) in which either no meaning at all has been expressed, the sentence having been left unfinished, as *e.g.*, where there is a grant "of ——— to A" or a grant "of Blackacre to ———;" or (2) where, though the language is intelligible, it is such as to give rise to an obvious uncertainty of meaning, as when, *e.g.*, a man contracts to sell "one of my horses" or "a horse for Rs. 1,000 or Rs. 1,500." Here, as the language expresses no definite meaning, if evidence were allowed to be given as to what the intention of the person using it was, the effect would be, not to interpret words, but to conjecture as to intentions, and this the section forbids. Where persons describing themselves as residents of Jaras Bas Mohan, gave a bond for the payment of money, in which, as collateral security, they charged their property generally in the following terms:—"We hypothecate as security for the amount our property with all the rights and interests," the High Court dismissed a special appeal in which it was contended that the bond created a charge on the property situated at Jaras Bas Mohan. Parol evidence to explain what was meant by "our property" was held to be excluded by this section; *Deojit v. Pitambar*, 1 I. L. R., All., 275. Compare the case of *Macdonald v. Longbottom*, 28 L. J., Q. B., 293, *ante* page 276. Where documents are obscure, but where both parties have long acted on the footing of a given practical construction the Court, in the absence of better evidence, will accept that construction, as correct; *Forbes v. Watt*, L. R., 2 Scotch Appeals, 214. In this case the

document was not "ambiguous or defective," but admitted of more than one construction.

When a bill of exchange purported, in the body of it, to be drawn for two hundred pounds, but the figures at the top were £245, and the stamp was for the larger amount, it was held that evidence of the intention of the parties to draw the bill for the larger amount was inadmissible, and that the sum mentioned in words in the body of the bill must be taken as that for which the bill was drawn; *Sanderson v. Piper*, 7 Scott, 408.

"An agreement is not to be deemed unintelligible because of some error, omission or mistake in drawing it up, if the real nature of the mistake can be shown so as to make the bargain intelligible. Thus, in *Coles v. Hulme*, 8 B. & C., 568, a bond "to pay 7,770" was allowed to be amended by adding the word "pounds," the recital in the condition showing that that must have been the meaning of the parties." *Benj.*, 28.

Meaning of the term "ambiguous or defective."—A document is not "ambiguous or defective" merely "because an ignorant and uninformed person is unable to interpret it." It is ambiguous only if found to be of uncertain meaning by persons of competent skill and information. "The question," it has been observed, "whether language is ambiguous must depend mainly upon this, whether it is ambiguous when addressed to a person competent to interpret language. Words cannot be ambiguous because they are unintelligible to a man who cannot read, and, within the same reason, words cannot be ambiguous merely because the Court, which is called upon to explain them, may be ignorant of a particular fact, science or art, which was familiar to the person who used the words, and a knowledge of which is, therefore, necessary to a right understanding of the words he has used.....It must, therefore, it is conceived, be admitted that a Judge is not competent to explain a testator's words, unless he has cognizance of these extrinsic facts, with reference to which a testator expressed himself: and, consequently, that when the meaning of the words, aided by the light derived from the circumstances of the case, is certain, their ambiguity cannot with truth or propriety be said to exist." See Wigram's *Extrinsic Evidence*, Propositions VI & VII.

Evidence may be given to show that language, apparently ambiguous, is not ambiguous when taken in connection with the facts to which it refers. Thus, in the case of a legacy to "one of the children of A by her late husband B," evidence would be admissible to show that A had only one son by B, and that this fact was known to the testator, and thus that the expression, though apparently ambiguous,

was not really so, since it did sufficiently identify the object of the legacy; if, however, A had more than one child by B, the meaning would be ambiguous and evidence of the intention of the testator would be inadmissible. *Wig. Ex. Ev.*, 3d Ed., 66.

Rule in the Indian Succession Act.—Section 100 provides that “Nothing in the chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865) as to the construction of wills.” Section 68 of Act X of 1865 declares that “where there is an ambiguity or deficiency on the face of the will, no extrinsic evidence as to the intentions of the testator shall be given.”

By section 64 of the Indian Succession Act, extended to the wills of Hindus, &c., by Act XXI of 1870, “where any word, material to the full expression of the meaning, has been omitted, it may be supplied by the context. *Illustration.* The testator gives a legacy of ‘five hundred’ to his daughter A, and a legacy of ‘five hundred rupees’ to his daughter B. A shall take a legacy of five hundred rupees.”

94. When language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts.

Exclusion of evidence against application of document to existing facts.

Illustration.

A sells to B by deed ‘my estate at Rampore containing 100 bigás.’ A has an estate at Rampore containing 100 bigás. Evidence may not be given of the fact that the estate meant to be sold was one situated at a different place and of a different size.

Note.

This section falls under the more general rule of English law that where the words of a document are free from ambiguity, and external circumstances do not create any doubt or difficulty as to the proper application of the words, the document is to be construed according to the plain common meaning of the words, and that, in such case, extrinsic evidence, for the purpose of explaining the document according to the supposed intention of the parties, is inadmissible; *Shore v. Wilson*, 5 Scott, N. R., 958, at page 1037.

The corresponding rule, as laid down by Wood, V. C., as to wills, is that “when any subject is discovered which not only is within the words of the instrument, according to their natural construction, but exhausts the whole of those words, then the investigation must

stop; you are bound to take the interpretation which entirely exhausts the whole of the series of expressions used by the testator, and are not permitted to go any further;" *Webb v. Byng*, 1 K. & J., 580.

Except in the case of words used in a technical or peculiar sense.—But this does not have the effect of excluding evidence to explain the meaning of language which, though apparently plain, is really used in a technical or peculiar sense; see note to Section 98.

Evidence as to document unmeaning in reference to existing facts.

95. When language used in a document is plain in itself, but is unmeaning in reference to existing facts, evidence may be given to show that it was used in a peculiar sense.

Illustration.

A sells to B by deed 'my house in Calcutta.'

A had no house in Calcutta, but it appears that he had a house at Howrah, of which B had been in possession since the execution of the deed.

These facts may be proved to show that the deed related to the house at Howrah.

Note.

When evidence is admissible to show that the language of a document is used in a peculiar sense.—Thus, where a written contract, dated October 24th, purported to indemnify against a bill, described as payable three months from that date: evidence was admitted to show that there was such a bill as described, but dated October 25th, and that that was the bill to which the indemnity was intended to apply, notwithstanding the discrepancy in date; *Way v. Hearne*, 82 L. J., C. P., 84.

Falsa demonstratio non nocet.—Under this section, it is apprehended, evidence will be admissible, in cases in which the maxim "*falsa demonstratio non nocet*" applies, that is, where there are inaccurate descriptions of specific things or persons, for the purpose of showing who or what the thing or persons, so inaccurately described, really is, "The characteristic of cases within the rule is that the description, so far as it is false, applies to no subject at all, and so far as it is true, applies to one only." *Per Alderson, B., Morrell v. Fisher*, 4 Exch., 591, at page 604. In the case of wills, (to which when made under Act X of 1865, or by Hindus, Jains, Sikhs, and Buddhists in Lower Bengal and the towns of Madras and Bombay to whom parts of that Act were extended by Act XXI of 1870, these sections do not apply, see Section 100,) the English Courts have gone

great lengths in carrying out the intentions of the testator, when a person or thing, inaccurately described, can be ascertained from extraneous circumstances. The same principle would, under this section, be applied to deeds and instruments other than wills regulated by the Indian Succession Act, and some examples of its application from the English decisions may be useful. Thus, a legacy given to Catharine Earnley was claimed by Gertrude Yardley, and awarded to her on its being shown that no such person as Catharine Earnley was known to the testator, that the testator was in the habit of calling the claimant Gatty, which might easily have been mistaken by the person who drew the will for Katy, and on other evidence showing that Gertrude Yardley was the person really meant: in the same way a legacy to "Mrs. and Miss Bowden of Hammer-smith, widow and daughter of the late Rev. Mr. Bowden," was claimed by Mrs. Washbourne and her daughter, on its being shown that Mrs. Washbourne was daughter of Mr. Bowden, that Mrs. Bowden had been dead for many years and that since her death no one of the name had resided at Hammersmith, and that the testatrix had been in the habit of confounding the names of the two families, and was in the habit of calling Mrs. Washbourne by her maiden name.

So, again, a devise to the second son of *Edward Weld* of Lulworth was upon the context of the will and evidence as to the condition of the Weld family and the testator's acquaintance with its different members, held to mean devise to the second son of *Joseph Weld* of Lulworth on proof that the testator had been in the habit of calling the possessor of Lulworth "Edward," although there was in fact an Edward Joseph Weld, who resided at Lulworth and was usually called Edward; *Lord Camoys v. Blundell*, 1 H. L. C., 778. In *Charter v. Charter*, L. R., 2 P. & D., 315, the testator appointed as his executor his son, Forster Charter. He had no son of that name, but had two sons named William Forster Charter and Charles Charter. The Court, on evidence of the circumstances under which the testator, wrote the will, and of the position of the parties about him, and also on consideration of the contents of the will itself, determined that the latter was the person denoted by the will, and decreed probate to him. It would seem that in such a case the Court may receive parol evidence of the intention of the testator. There must, however, be enough in the document itself to establish the identity of the person or thing referred to, and to allow of so much as is inaccurate being discarded as surplusage. The rule is thus laid down in the English Courts; "as soon as there is an adequate and sufficient definition, with convenient certainty, of what is intended to pass by a deed, any subsequent erroneous addition will not vitiate it;" *Llewellyn v. Earl of Jersey*, 11 M. & W., 183, at page 189. In *Selwood v. Mildmay*, 3

Ves. Jun., 306, a testator bequeathed part of "my stock in the £4 per cent. annuities of the Bank of England:" it was shown that, at the time of making the will, he had no such annuities, but that he had had some, which had been sold out and the proceeds invested in long annuities: it was held that the bequest was, in substance, a bequest of stock, and that, as annuities of the precise character could not be discovered, the only annuities discoverable should be held to pass by the will. So, again, a bequest of "my freehold houses in Aldersgate street," where the testator had no freehold but only leasehold houses in that street, has been held to pass the leasehold houses, the word "freehold" being rejected as surplusage; *Goodman v. Edwards*, 2 My. & K., 759.

In *Doe d. Gains v. Rouse*, 5 C. B., 422, a testator having a wife, Mary, alive, who survived him, went through the ceremony of marriage with another woman, named Caroline, who lived with him as his wife till his death. His bequest "to my dear wife, Caroline" was held to pass the property to Caroline and not to the real wife. There was no doubt, the Court observed, as to the testator's intention and the inapt description of the person was no reason why the property should go to a person not intended by the testator.

It has sometimes been contended that where a person or thing is named, and an inaccurate description is added, the name shall invariably prevail as against the description. There is, however, nothing to sanction such a view. "I think," says Lord Campbell speaking of such cases. "that there is no presumption in favour of the name more than of the demonstration. Upon referring to the numerous cases that have been cited at the Bar, it will be found that there are more instances in which the demonstration prevailed than in which the name prevailed;" *Drake v. Drake*, 8 H. L. C., 172.

When oral statements of the person making a document are admissible.—Wherever, under this and the following sections, evidence is admissible to explain a document, oral statements of the person making the document are admissible, and it matters not whether those statements are prior to, contemporaneous with, or subsequent to the making of the document. "They may, of course, have more or less weight according to the time and circumstances under which they were made: but their admissibility depends entirely on other considerations." *Doe d. Allen v. Allen*, 12 A. & E., 451.

Evidence as to application of language which can apply to one only of several persons.

96. When the facts are such that the language used might have been meant to apply to any one, and could not have been meant to apply to more than one, of several persons or things, evidence may

be given of facts which show which of those persons or things it was intended to apply to.

Illustrations.

(a) A agrees to sell to B for Rupees 1,000 "my white horse." A has two white horses. Evidence may be given of facts which show which of them was meant.

(b) A agrees to accompany B to Hyderabad. Evidence may be given of facts showing whether Hyderabad in the Deccan or Hyderabad in Scinde was meant.

Note.

Where a document correctly describes two sets of circumstances and is not intended to apply to both, evidence is admissible to show to which set it was intended to apply.—Section 94 provides that where the language of a document is plain and applies accurately to existing facts, evidence may not be given to show that it was meant not to apply to such facts. The present section so far modifies the rule as to provide that where language correctly describes two sets of circumstances and cannot have been intended to apply to both, evidence may be given to show to which set it was intended to apply. The "facts" referred to in the section will include statements: see last paragraph of note to Section 95.

Rule in the Indian Succession Act.—Section 67 of the Indian Succession Act, X of 1865, which is one of the sections extended to the wills of Hindus, &c., by Act XXI of 1870, declares that "where the words of the will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of those applications was intended." See Section 88 of Act X of 1865, and the notes to Section 97 of this Act.

97. When the language used applies partly to one set of existing facts, and partly to another set of existing facts, but the whole of it does not apply correctly to either, evidence may be given to show to which of the two it was meant to apply.

Evidence as to application of language to one of two sets of facts to neither of which the whole correctly applies.

Illustration

A agrees to sell to B 'my land at X in the occupation of Y.' A has land at X, but not in the occupation of Y, and he has land in the occupation of Y, but it is not at X. Evidence may be given of facts showing which he meant to sell.

Note.

Where language is partially applicable to two sets of facts, but wholly applicable to neither, evidence is admissible.—This Section is the converse of the preceding one: in that there is language equally applicable to two sets of facts: here there is language partially applicable to two sets of facts, but wholly applicable to neither. In this case, as in the former, extrinsic evidence is admissible for discovering the meaning. It is an extension of the rule laid down in Section 95.

According to the English law, in cases such as these, although extrinsic evidence of the surrounding circumstances may be received, for the purpose of ascertaining to which set of facts the language refers, *evidence of the author's declarations of intention is inadmissible*. *Taylor*, § 1226. This distinction is not, apparently, preserved in the present Act.

Application of rule in the case of Wills.—This rule of construction was carried a great length, in its application to wills, in an English case; *Ryall v. Hannam*, 10 Beav., 536. A devise was made to the testator's nephew for life, remainder over to "Elizabeth Abbott, a natural daughter of Elizabeth Abbott of Collingham, single woman, who had formerly lived in his service." Elizabeth Abbott, the mother had, at the date of the will, two children, a natural son, of whom the testator's nephew was supposed to be the father, and a legitimate daughter. The natural son was held entitled under the devise, though neither sex nor name applied to him. Under this section would fall the case, referred to in the note to Section 95, in which a devise "to my dear wife Caroline" by a man, who had gone through a ceremony of marriage with a person named Caroline in the lifetime of his real wife, was held to pass the devised property to the person named Caroline; *Doe d. Gains v. Rouse*, 5 C. B., 422.

With regard to wills the law is thus laid down in Hawkins' Treatise on the construction of wills, pages 9 and 11:—"Parol evidence is admissible to show what were the actual testamentary intentions of the testator, to determine which of several persons or things was intended under an *equivocal description*.....the general test of such a description is, that it must apply with entire propriety to each of the persons or things in question. A description, which applies partly to one and partly to another of the persons or things in question, is not equivocal. Thus a devise to John Thomas Smith, there being a John Smith and a Thomas Smith, is not equivocal with respect to them. But descriptions which are partly inaccurate are equivocal if the inaccurate part of the description applies to *none* of the persons or things in question. Thus a devise to John Thomas Smith is equivocal, if there be no Smith bearing the christian name of Thomas, but two

or more Smiths with the Christian name of John. In this case the word 'Thomas' which is inapplicable to *any* of the claimants, being rejected, the description John Smith remains which is equivocal." In such a case extrinsic evidence of the testator's intention is admissible. This is also the law under the Indian Succession Act (X of 1865) Section 67.

98. Evidence may be given to show the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local, and provincial expressions, of abbreviations⁽¹⁾ and of words used in a peculiar sense.⁽²⁾

Evidence as to meaning of illegible characters, &c

Illustration.

A, a sculptor, agrees to sell to B 'all my mods.' A has both models and modelling tools. Evidence may be given to show which he meant to sell.

Note.

(1) **Evidence is admissible to explain technical expressions.**—When an expression used in a document has a technical meaning, parol evidence may be given to show that it is used in its technical and not in its ordinary meaning in common parlance, although it may be perfectly clear and unambiguous in itself. So, when the lessee of a mine covenanted to get the whole of the mine "not deeper than the level of the mine at a particular point" parol evidence was admitted to show that amongst miners "level" had a technical meaning different from the ordinary signification of horizontal line; (*Nayton v. Gregson*, 5 A. & E., 302.

So, in a memorandum about a horse race, evidence was admitted to show that the words "across country" meant that the riders were to jump the obstacles and not go through gates; *Evans v. Pratt*, 3 M. & G., 759.

So, parol evidence has been admitted to show that by usage of the hop-trade "ten pockets of Kent hops at £5," means at £5 per cwt.; *Spicer v. Cooper*, 1 Q. B., 424; that "months" in a charterparty means "calendar months, *Jolly v. Young*, 1 Esp., 186;" and that "days" in a bill of lading means "working days; *Cockran v. Resberg*, 3 Esp., 121;" and in the same way special technical meanings have been proved in the case of the phrases "duly honored," as to a bill; *Lucas v. Groning*, 7 Taunt., 164; "in turn to deliver" in a charterparty; *Robertson v. Jackson*, 2 Com. B., 412; "weekly accounts" as meaning, in a certain trade, accounts of particular work *only*; *Myers*

v. Sari, 80 L. J., Q. B., 9; a "bale of cotton" as meaning a "bag" in the Alexandrian Trade, and a compressed bale in the Calcutta trade; *Taylor v. Briggs*, 2 C. & P., 525. So, where in a lease as to a rabbit warren, the lessee, covenanted to leave 10,000 rabbits at the expiration of the lease, evidence was admitted to show that according to local usage 1,000 meant 1,200 when applied to rabbits; *Smith v. Wilson*, 8 B. & Ad., 728. See further an alphabetical list of expressions interpreted on this principle in *Taylor* § 1162 *note*.

Evidence of former transactions between the same parties can be received for the purpose of explaining the meaning of the terms used in their written contract; *Bourne v. Gatliff*, 11 C. & F., 45.

(2) **Or words used in a peculiar sense.**—Thus evidence was admitted to show the meaning of the letters P. P., at the end of a bet, *viz.*, Play or Pay, that is to say, run the match or pay the bet; *Gaintree v. Hutchinson*, 10 M. & W., 85. And, so, where a legacy was left to "Mrs. G.," evidence was admitted to show that the testator was in the habit of calling a certain person "Mrs. G." and she was allowed to take under the initial.

So where a grant of land was dated "26 Falgoon in the year 16," it was held that the meaning of these words might be shown by reference to another deed signed by the same officer from which it appeared that "the year 37" meant "the 37th year of the Rajah of P." and corresponded with 1183 B. S.; *Equitable Coal Company v. Gunesk Ghunder Banerjee*, 9 Cal., 276.

Who may give evidence of agreement varying terms of document.

99. Persons who are not parties to a document, or their representatives in interest, may give evidence of any facts tending to show a contemporaneous agreement varying the terms of the document.

Illustration.

A and B make a contract in writing that B shall sell A certain cotton, to be paid for on delivery. At the same time they make an oral agreement that three months' credit shall be given to A. This could not be shown as between A and B, but it might be shown by C if it affected his interests.

Note.

Meaning of "varying."—Doubts have been expressed whether under this section, the right conferred on persons, other than the parties to a document or their representatives, of giving evidence of a contemporaneous oral agreement "varying" the document, must not be

understood as restricted to 'varying' in contradistinction to "contradicting, adding to or subtracting from" its terms. There is no reason, however, to suppose that any such distinction, which is certainly unknown to English law, was intended. The word "varying" was no doubt employed as embracing contradictions, additions and subtractions.

100. Nothing in this chapter contained shall be taken to affect any of the provisions of the Indian Succession Act (X of 1865) as the construction of wills.

Saving of provisions of Indian Succession Act relating to wills.

Note.

These are contained in Chapter XI: Act XXI of 1870 extends parts of Act X of 1865 and of Chapter XI, Sections 61—77 and Sections 82, 83, 85, 88—103 inclusive, to the wills of Hindus, Jains, Sikhs and Buddhists in Lower Bengal and the towns of Madras and Bombay. It is, therefore, only to wills other than these and to instruments other than wills that the provisions of the present chapter apply.

PART III.**PRODUCTION AND EFFECT OF EVIDENCE.****CHAPTER VII.****OF THE BURDEN OF PROOF.**

Burden of
proof.

101. Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Illustrations.

(a) A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime.

(b) A desires a Court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts and which B denies to be true.

A must prove the existence of those facts.

Note.

Burden of proof.—This and the other sections of this chapter deal with a topic of the utmost importance in judicial proceedings, *viz.*, what are the facts which, on the face of the proceedings, the Court will assume until the contrary be shown. This raises the whole question of presumptions, and presumptions range in cogency from those which are imperative directions of the law to draw certain conclusions, irrespective of the Judge's own opinion of the matter, (as *e.g.*, the conclusive presumptions in favor of legitimacy in Section 112,) to those which are mere inferences, permitted by the law, if, in the circumstances of the case, the Court thinks fit to draw them, (as *e.g.*, the presumptions mentioned in Section 114.) Section 114 may, in fact, be said to indicate the point at which the Act, which has been

hitherto guiding the Judge's steps in the discovery of the truth, leaves him to do the best he can by himself. It has prescribed the material on which, and on which alone, the conclusion is to be based: it has shown how that material is to be brought to the Judge's mind and it has laid down in the earlier sections of this chapter some restrictions as to the use to be made of that material. The first four sections of the chapter enact the general English rule as to the burden of proof; Section 103 is merely an amplification of Section 101, and Section 102 supplies a test, frequently applied in the English cases, for the purpose of ascertaining on whom the burden of proof lies. Sections 105—110 lay down certain special rules casting the burden of proof on particular persons: Sections 111 and 112 provide for two cases in which, under particular circumstances, not only is the burden of proof of a fact removed from one party, but the other party is not allowed to disprove it, the fact being deemed by the law to be conclusively proved. Section 114 concludes the subject by a general authorization to draw reasonable inferences.

102. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

On whom
burden of
proof lies

Illustrations.

(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.

If no evidence were given on either side, B would be entitled to retain his possession.

Therefore the burden of proof is on A

(b) A sues B for money due on a bond.

The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed, as the bond is not disputed and the fraud is not proved

Therefore the burden of proof is on B

Note.

On whom burden of proof lies.—The test provided by the section was suggested by Alderson, B., in *Amos v. Hughes*, 1 M. & R., 464, and has been repeatedly made use of subsequently in the English Courts. Thus, where execution of a deed is admitted, but defendant denies having received consideration, the burden of disproving such

receipt lies on the defendant; *Sivarāmaiyar v. Samu Aiyar*, 1 M. H. C. R., 447. So, also, where, in a summary proceeding between persons claiming to be coheirs, a defendant had been adjudged a coheir, the burden of proving his illegitimacy lies on the plaintiff's coheirs; *Ashrufodd Dowlah v. Hyder Hossain Khan*, 11 Moore's I. A., 94, at page 108. So, again, where a ryot digs a tank on his landlord's ground, the burden of proving a customary or other right to do so lies on the ryot; *Tarini Charan Bose v. Debnarayan Mistri*, 8 B L. R., App., 69.

In an action brought to recover property which had belonged to a judgment-debtor and was attached by the defendant, the plaintiff alleged that the property was bought by her before the decree for attachment was made. The application to remove the attachment had failed and so plaintiff brought the action alleging the sale. It was held that it was not incumbent on the defendant to prove the sale fictitious but that plaintiff must prove it genuine; *Govind Atmaram v. Santai*, 1. L. R., 12 Bom. 270.

So, where a Zemindar sues for a declaration that certain lands within his Zemindari, held by the defendant are rent-paying, and it is shown that other lands held within the Zemindari by the defendants, and not distinguishable as a separate holding from those in suit, are rent-paying, the defendant must give *prima facie* proof that some of the lands in suit are rent-free before he can call upon the Zemindar to prove that all or any of them are rent-paying; *Mir Akbar Ali v. Bhya Lal Jha*, 7 Cal., 497.

But where a Zemindar sues to resume or assess lands, held under a rent free title, which he alleges to be invalid, and the defendant either is not a tenant of his for other lands, or, being a tenant, holds lands in a separate parcel or otherwise in such a manner as to be distinct from the lands in suit, the burden of showing the lands to be rent-paying lies on the Zemindar, 7 Cal., 502. All lands within a zemindary must be considered as part of the zemindary, and persons wishing to separate their lands from those of the zemindary must prove their title to do so; *Wise v. Bhooabun Moyee Debia*; 3 W. R. P. C. 5.

Although, at the time when a deed of sale, containing an acknowledgment of payment, is written, payment is not made, it may become an acknowledgment afterwards, i.e., when the deed is handed over; *Nawab Syud Allee Shah v. Mussamut Amanee Begum*, 19, W. R., Civil Rulings, 149.

Shifting of burden of proof.—Sir James Stephen adds (*Dig.*, § 95) “As the proceeding goes on, the burden of proof may be shifted from the party, on whom it rested at first, by his proving facts which raise

a presumption in his favor." Thus at any moment throughout the case, the proof of some fact by one party may throw upon the opposite party the burden of disproving some inference, which the proved fact, *prima facie*, suggests. See *Tatum v. Haslar*, 23 Q. B. 11., 345. But where in an action for recovery of land the defendant pleaded that the plaintiff purchased *benami* it was held that the burden of proof nevertheless lay on the plaintiff to establish a *prima facie* case; *Huri Ram v. Raj Coomar Opadhya*, I. L. R., 8 Cal., 759.

Burden of proof in ejectment.—In ejectment suits the burden of proof is on the plaintiff to show possession and dispossession within 12 years; *Maharajah Koowur v. Baboo Nund Lall Sing*, 8 Moore's I. A., 199; *Beer Chunder Zobray v. Deputy Commissioner of Bhul-loah*, 18 W. R., P. C., 23. A doubt was cast on this rule by the ruling of the Privy Council in *Raethen Gorind Roy v. Inglis*, 7 I. L. R., Cal., 364, where, title being shown, the burden was thrown on the defendant. It has been held, however, that this ruling had reference to the special character of the lands in suit, which had been recovered after diluvium, and is not to be accepted as altering the settled rule of law in ordinary cases; *Cally Chund Lahoo v. Secretary of State for India*, I. L. R., 7 Cal., 225, and *Mano Mohun Ghose v. Mothura Mohun Roy*, I. L. R., 7 Cal., 725. *Moro Desai v. Ram Chundra Desai*, I. L. R., 6 Bom., 510.

103. The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

Burden of proof as to particular fact.

Illustration.

(a) A prosecutes B for theft, and wishes the Court to believe that B admitted the theft to C. A must prove the admission.

B wishes the Court to believe that, at the time in question, he was elsewhere. He must prove it.

Note.

Person wishing the Court to believe a fact, must prove it.—This is another way of stating the rule laid down in Section 101. There are, however, a large number of cases in which the law, on grounds of policy, throws the burden of proof on particular persons. One large class of these is where the burden of proving authority, consent or lawful excuse is thrown upon persons, against whom the facts of the case raise a reasonable suspicion. Thus in England, a

person indicted for being found at night in possession of an implement of house-breaking, or for having in his possession coining tools or forged dies or other materials for the commission of crime, is bound to protect himself by showing some lawful excuse or authority. *Tayl.*, § 372, note 2. So under Section 105 of the present Act the burden of proving any circumstance, bringing the case within any general or special exception, is thrown upon the accused.

So also the Criminal Tribes Act, 1871, Section 9, throws upon the member of a "Criminal Tribe" the burden of proving 'a lawful excuse' in certain cases.

Proof by collateral heir.—A plaintiff, who claims as a collateral heir, must prove his title through the common ancestor in all its stages, and, accordingly, must show who the common ancestor was; *Kedarnath Ghose v. Protar Chunder Doss*, I. L. R., 6 Cal., 629.

Burden of Proof in case of Deeds.—When the genuineness of a deed, on which the plaintiff sues, is put in issue, the burden lies on the plaintiff of proving, not only the execution, but the *bonâ fides* of the deed; *Brajeswaree Peshakar v. Budharaddi and another*, I. L. R., 6 Cal., 268.

The party who seeks to show that his deed had a different effect from that which it purports to have, must, of course, prove that this is so. Thus where property is purchased in the name of a benamidar, and all the insignia of property are placed in his hands, and the true owner wants to get rid of the effect of an alienation by the benamidar, the *onus* lies on him to show that (1) the alienation was made without his acquiescence, and (2) that the purchaser took with notice of that fact; *Bhugwan Doss v. Upooch Singh*, 10 W. R., (Civil Rulings), 185.

Where a plaintiff claims land as purchaser in good faith from a benamidar, who has been registered as owner and who by the act of the true owners had been allowed to become the apparent owner, the burden lies upon him; *Rutto Sing v. Bajrang Sing and others*, 13 Cal., 280.

Altered documents.—As to the burden of proof respecting the genuineness of an altered document, see note to Section 62. The burden of showing that an alteration, which appears on the face of a bill, was made under such circumstances as not to vitiate it lies on the plaintiff; *Byles on Bills*, (15th ed.,) p. 339.

Unstamped Documents.—The burden of proving an instrument to be unstamped lies, in the first instance, on the party who objects to its production on the ground that it is unstamped. Where there is no evidence on either side, it will be presumed to have been stamped.

But when once satisfactory evidence has been given that at a particular time the instrument was unstamped, there is an end of any presumption of law in favor of its having been stamped, the *onus* of proof is shifted, and the party who relies on the instrument must prove it to have been duly stamped: *Marine Investment Company v. Haviside*, L. R., 5 H. L., 624.

Any instrument upon which an indorsement, as provided by s. 31 of the Stamp Act I of 1879, has been made, shall be deemed to be duly stamped and shall be receivable in evidence accordingly; 3 All. 115.

Attachment of debtor's person.—Where an application is made for attachment of a debtor's person, the *onus* is on the debtor to show that he has no property, not on the creditor to show that by sending the debtor to prison some satisfaction of the debt would be obtained: *Seton v. Bijohn*, 8 B. L. R., 255.

Compromise.—The *onus* of showing that a compromise has been fraudulently obtained by intimidation and false representation, rests upon those who seek to impeach the validity of their own deed; *Rajunder Narain Rae v. Bijai Govind Sing*, 2 Moore's I. A., 181.

Presumption in favor of defendant.—Where a plaintiff fails to make out his case, the presumption will be in favor of the defendant; thus, *e. g.*, in an action for money lent, the only evidence was that plaintiff handed defendant a bank note, the amount of which did not appear. The Jury was directed to presume the note to have been one for £5, that being the smallest in circulation: *Lawton v. Sweeney*, 8 Jur., 964.

104. The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

Burden of proving fact to be proved to make evidence admissible.

Illustrations.

(a) A wishes to prove a dying declaration by B. A must prove B's death.

(b) A wishes to prove, by secondary evidence, the contents of a lost document.

A must prove that the document has been lost.

Note.

By Section 136 the Court may, if it is satisfied with the undertaking of the party proposing to prove a fact, allow such fact to be proved previous to proving the fact necessary to render it admissible.

Burden of proving that case of accused comes within exceptions.

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

Illustrations.

(a) A, accused of murder, alleges that, by reason of unsoundness of mind, he did not know the nature of the act.

The burden of proof is on A.

(b) A, accused of murder, alleges that, by grave and sudden provocation, he was deprived of the power of self-control.

The burden of proof is on A.

(c) Section three hundred and twenty-five of the Indian Penal Code provides that whoever, except in the case provided for by section three hundred and thirty-five, voluntarily causes grievous hurt, shall be subject to certain punishments.

A is charged with voluntarily causing grievous hurt under section three hundred and twenty-five.

The burden of proving the circumstances bringing the case under section three hundred and thirty-five lies on A.

Note.

Burden of proving an exception.—This is one of the laws, referred to in Section 108, providing that proof of certain facts shall lie on a particular person. It has a most important bearing on criminal pleadings and evidence, inasmuch as it relieves the prosecution from the necessity of averring or proving the absence of circumstances which might constitute a general or special exception under the Penal Code or other Criminal Law. Under the Criminal Procedure Code of 1861 it was necessary, in a charge upon a section of the Penal Code containing special exceptions, to aver the absence of any such exception. This necessity no longer exists in regard either to special or general exceptions; In *re Shibo Prosad Pandah*, I. L. R., 4 Cal., 124.

With regard to the general question of criminality, it must be remembered that there is a presumption in favor of innocence, and that

the burden lies on any one who, either in a Criminal or Civil Proceeding, asserts that a crime or wrongful act or other illegality has been committed, to prove his assertion; *Stoph. Dig.*, § 94. Thus where A sues B on a policy of fire Insurance and B pleads that A burnt down the house on purpose; B must prove his plea with all the completeness of a criminal trial. So, again, in an action for loading inflammable material on board ship without notice, the plaintiff must prove the absence of notice.

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.

Burden of proving fact especially within knowledge.

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.

(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him.

Note.

Burden of proving fact specially within knowledge.—Mr. Taylor mentions, as an exception to the rule that the burden of proof lies on him who substantially asserts the affirmative of the issue, the rule that “where the subject-matter of the allegation lies peculiarly within the knowledge of one of the parties, that party must prove it, whether it be of an affirmative or a negative character, and even though there be a presumption of law in his favor.”—*Tayl.*, § 376 a. But the present section will not, it is submitted, relieve the plaintiff from the necessity of making out his case, unless the fact in question be so especially within the defendant’s knowledge that he alone can be expected to know about it. Thus, in *Gudhar Hari v. Kali Kant Roy*, 3 B. L. R., 161, where A sued to recover land of B, and B admitted that the tenure of certain lands, which he formerly held, had passed to the plaintiffs, but denied that the particular land in question formed part of the tenure, Markby, J., held that the burden of proving that the lands in question did form part of the tenure was on the plaintiff. The learned Judge, in considering the English cases on the subject, expresses an opinion that Mr. Taylor’s statement of the law (§ 347) is scarcely borne out by the decisions; and he quotes a ruling of Lord Denman, C. J., in support of his opinion; *Doe v. Whitehead*, 8 A. & E., 571. In that case plaintiff alleged that the defendant had hired a house from him and had covenanted to keep the house insured, and

the absence of proof this law is rightly reversed. *Idharaj I P & Q L 288* Ibid 6 Q L 24. Where a prostitute purchases infants with the intention of bringing them up as prostitutes she must show that she did not marry them & such before they were sixteen. *Deputy L J & L v. A. K. K. F. Asthik I I L 22 C d 164*

107. When the question is whether a man is alive or dead, and it is shown that he was alive within thirty years the burden of proving that he is dead is on the person who affirms it

burden of
proving death
if person
known to have
been alive
within thirty
years

Note.

Presumptions of death in Hindu and Mahomedan law—The Hindu law presumed the death of a person if he was missing for 12 years or if he was 10 years the Mahomedan law presumed the death of a missing person ninety years after his birth though he had been seen last within 10 years. These rules are now superseded.

108. [Provided that] when the question is whether a man is alive or dead and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is on the person who affirms it

Burden of
proving that
person is alive
who has not
been heard of
for seven
years

Note.

Presumption of death from lapse of time—In *Lal Singh v. Bisheshwar Singh I I L 1 All 33* the reversioners next after Janki Rai to the estate of Sahj Rai deceased succeeded to set aside an alienation of Sahj Rai's estate affecting their reversionary right made by his widow. Janki Rai had not been heard of for 8 or 9 years and there was no proof of his being alive. The Full Bench of the Allahabad High Court held that his death might be presumed under this section for the purposes of the suit, though in a suit for the purposes of administering the estate the Court might have to apply the Hindu law of succession prescribed when a person is missing and not dead. Where a person is presumed to be dead from not having been heard of for 7 years is a legatee under the will of a person dying within 7 years after his disappearance the burden is upon his representative as against the residuary legatee under the will to prove that he survived the testator. *In re L. L. Trusts L R 11 Eq 236*

affirmed on appeal, L. R., 6 Ch., 356; *In re Phené's Trusts*, L. R., 5 Ch., 139; *In re Green's Settlement*, L. R., 11 Eq., 288. See also *Dhondo Bhikaji v. Ganesh Bhikaji*, L. R., 11 Bom., 483.

No presumption as to time of death.—"Where any person has to prove *the fact* of death, he proves it by presumption of law from the lapse of time, but when he has to prove *the time* of death, he must prove it affirmatively, for there is no presumption that the death took place at any time in that seven years," *Per* Sir W. M. James, L. J., *In re Leves' Trusts*, L. R., 6 Ch., 357. *Doe v. Nepean*, 5 B. & Ad., 86; 2 M. & W., 894. See too *Dharub Nath v. Gobind Saran*, I. L. R., 8 All., 614. See the question considered in *in re Phené's v. Trust*, L. R., 5 C. A., 139; and *Prudential Assurance Company v. Edmunds*, L. R., 2 App. Cas., 487. The burden of proving that a person died at any particular time lies on the person who asserts that he did so die; *In re Rhodes, Rhodes v. Rhodes*, 35 Ch. D., 586.

The words 'provided that' were added by Act XVIII of 1872.

Burden of proof as to partnership, tenancy and agency.

109. When the question is whether persons are partners, landlord and tenant, or principal and agent, and it has been shown that they have been acting as such, the burden of proving that they do not stand, or have ceased to stand, to each other in those relationships respectively, is on the person who affirms it.

Note.

This section merely applies to three common and important relationships.—partnership, landlord and tenant, and principal and agent—the general presumption based on the continuance of human affairs in the state in which they are once shown to be. When, therefore, the existence of a relationship or state of things is once proved, the law presumes that it continues till the contrary is shown or some other presumption arises. On this principle it has been held in England that where a custom was found to have existed up to 1689, it must, in absence of any evidence of its discontinuance, be presumed to exist in 1840. On the same grounds a partnership shown to have existed in 1816 was presumed, in the absence of evidence to the contrary, to be in existence in 1838. The same presumption in favor of the continuance of a state of things, once shown to exist, is of general application. Thus, where the defendants had held under a private partition of lands for 40 years, it was held that the burden lay on the plaintiffs, who sued on a butwara effected by the Collector in

the absence of the defendants, to show that the private partition had terminated; *Obhoy Ukuru Chikal v. Hari Nath Roy*, 9 Cal., 81. The rule holds good in any case where a continuous course may be presumed. For instance, where a man on several occasions authorized his mistress to order goods for him on credit, it was held that the tradesman from whom they were ordered was justified, in the absence of notice, in assuming that the authorization continued. The contract Act, 1872, contains special provisions §§ 208 & 264, as to the mode in which the termination of the agency or partnership must be notified to persons who know of the relationship. On the same principle, where a partnership or tenancy continues after the expiry of the original period, it is presumed that the same terms and conditions as before govern it; *Indian Contract Act*, Sec 256.

110. When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Burden of proof as to ownership.

Note.

Ownership presumed from possession.—This section embodies the familiar principle that, as men generally own the property of which they are in possession, the burden of proof lies upon the person who asserts that this is not so in any particular instance. On this ground it is held that in an action of ejectment, the plaintiff must succeed by the strength of his own title not by the infirmity of the defendant's. The same rule applies as well to moveable as immoveable property. Thus, for instance, the person in possession of a ship may, in an action on a policy of assurance effected upon her, rely on the mere fact of possession without the aid of documentary proof, unless contrary evidence be adduced by the other party.—*Tayl.*, § 123. So a finder or bailee of goods may sue for wrongful retainer.

Mere forcible possession of a wrongdoer is insufficient to shift the burden of proof.—The possession, in order to fall under this section, must be shown to be something more than the mere violent seizure and occupation by a wrongdoer. A man cannot walk into another man's house, turn him violently out, and then throw upon him the burden of proving himself the owner. On the same principle it has been held that mere possession as a trespasser is not sufficient to entitle a plaintiff to recover in a possessory suit brought under Section 15 of Act XIV of 1859 now replaced by Section 19 of the Specific Relief Act I of 1877. There must be in the plaintiff juridical, as

opposed to mere physical possession; *Dādābhāi Narsidās v. The Sub-Collector of Broach*, 7 Bom. H. C. R., (A. C. J.) 82, see also *Sutherland v. Crowley*, 18 W. R., Criminal Rulings 11, in which Couch, C.J., discusses the meaning of the word "possession" as used in Section 530 of the Code of Criminal Procedure, and quotes Domat's Civil law, Section 2212, in support of his view that it must be taken to include, not only actual manual possession, but the possession of a master by his servant, of a landlord by his immediate tenant, of the person who has the property of the land by the usufructuary. When, therefore, the plaintiff shows that he was in possession in any of these ways, and his possession was illegally interfered with by the defendant, the burden is shifted upon the defendant of making out his title.

Rights arising from possession.—The presumption arising from possession has been recognized by the Indian Legislature both in criminal and civil proceedings. A person, dispossessed of immoveable property otherwise than by due course of law may, under the Criminal Procedure Code, Section 530, claim, on the mere strength of his possession and irrespective of the question of title, to be reinstated; and by Section 9 of the Specific Relief Act, I of 1877, it is provided that, if any person has been dispossessed of immoveable property otherwise than by due course of law, he will, in a suit to recover possession, be entitled to a decree for possession, notwithstanding any other title that may be set up. Such a suit must be brought within six months and does not bar other proceedings to establish the title. Where an order under either of these proceedings has been passed, and a regular suit is brought against the person placed in possession, the whole burden of proof will, of course, lie on the plaintiff.

Mere possession not sufficient proof of title, except in possessory suits, to dispossess person in possession.—A plaintiff, who is unable to make out a title to land, will not be entitled to recover on the ground of previous possession merely, except in a suit under Section 9 of the Specific Relief Act, I of 1877, brought within 3 months from the time of dispossession; *Wise v. Amirunessa Khatoon*, L. R., 7 I. A., 81. This case was cited in *Debi Churn Boido v. Issur Chunder Manjee*, I. L. R., 9 Cal., 39, as authoritatively laying down that mere anterior possession is not sufficient proof of possession to dispossess a person in possession. The mere fact of the plaintiff having been in possession within twelve years was held not to shift the burden of proof of title from him to the defendant. So also in *Ertaza Hosain v. Bani Mirtu*, I. L. R., 9 Cal., 130, in a suit for land from which the plaintiff alleged that he had been dispossessed by the defendant within twelve years prior to the suit, it was held that mere proof of possession was not enough to shift the onus of proof from the plaintiff to the defendant.

The ruling of *Morris, J.*, to a contrary effect in *Kawa Manjee v. Khowaz Nussio*, 5 C. L. R., 278 and other cases, are overruled by these decisions. The same view was taken by the Full Bench in *Mahomed Ali Khan v. Khaja Abdul Ghunny*, I. L. R., 9 Cal., 744, see too *Purmeshur Chowdhry v. Brij Lal Chowdhry*, I. L. R., 17 Cal., 256. A different view seems to prevail in Bombay; where it was held that when a dispossessed party proceeds under section 230 of the Code of Civil Procedure to vindicate the possession of which he has been deprived he may rest his right to recover on his possession, and shift the burden of proof on to the decree holder; *Pemraj Bhavaniram v. Narayan Shivaram Khisti*, I. L. R., 6 Bom., 215, see too *Krishnarav Yashwant v. Vashudev Apeji Ghotikar*, I. L. R., 8 Bom., 371. As to the effect of possession in the Allahabad Court, see *Lachho v. Har Sahai*, I. L. R., 12 All., 46, where it was held that possession for thirty or forty years even though followed by dispossession, gave the dispossessed plaintiff a right to call on the defendant to prove his case.

Where defendants proved that they had been in possession for a great number of years, it was held that the burden of proving that they were in under a special tenancy lay upon the plaintiff who alleged it; *Daulata v. Sakharam Gangadhar*, I. L. R., 14 Bom., 392. See too *Ratan Kuar v. Jiwan Singh*, I. L. R., 1 All., 194, where in a dispute as to whether the plaintiff's ancestor had mortgaged or sold the land in dispute the burden of proving all his case was thrown on him; and *Valoji Kristnan Gopalar v. Mayand Chetti*, I. L. R., 1 All., 194.

In actions for the recovery of land it has been held that there is a clear distinction as to the onus of proof between the case where a plaintiff sues for possession on redemption of a mortgage, and the case where the defendant sets up a case of twelve years adverse possession—in the first case the onus is on the plaintiff; in the second case on the defendant; *Pannanand Misr v. Sahib Ali*, I. L. R., 11 All., 438; and see *Sachho v. Har Sahai*, I. L. R., *supra*.

Evidence to prove ownership and presumption of continued possession.—As to evidence necessary to show ownership and the circumstances in which continued possession will be presumed, see *Mahomed Ali Khan v. Khaja Abdul Ghunny*, I. L. R., 9 Cal., 744, and note to Sec. 114.

Title by possession.—Where A's title and possession, at some time, are proved, and B has subsequently taken possession, the burden of proving that B's possession has been long enough to bar A, lies on B. (Semble aliter where A's previous possession is not proved); *Calli Chidn Sahoo v. Secy. of State*, I. L. R., 6 Cal., 733.

onus of disproving *bona fide* will not in every case rest upon the person endeavouring to settle the decision. Thus where in the course of settling up a charge made in his own favour a witness is called to prove facts presumably known to him, and the facts are such that those facts which embody the charge are so strong as to rebut the alleged denial of the estate and the motives from which his denial follows. *Huncomin Persell v. Mervin Mervin Khan*, 10 Moore's I. A. 591 at page 419. *Indra Raj v. Indra Raj*, 11 *Appaya* 2 M. H. C. R. 497. But where the facts are such as to put in question the *onus* of proving *bona fide* in the present case, the mere case on the facts.

In a suit by a wife of a Hindu husband against her husband to recover the value of Company papers sold by him, the plaintiff alleged that the papers belonged to her husband because she lived in a chattram in his house and he had sold the papers to his husband for the purpose of recovering the amount thereon. The defence of the husband was that he had paid his wife from his wife's money, on the understanding that he would have full value of his wife, who had appropriated the proceeds to her own use. It was held, upon a review of the evidence, that although the wife failed to prove affirmatively the precise circumstances in which the plaintiff's husband was bound to show some thing more than the mere endorsement and delivery of the Company's paper and that from the relation subsisting between the parties the *onus* of proof was upon him to establish, first, that the transaction which he set up was a *bona fide* sale, and second that he gave full value for the Company's paper so received from his wife. It was contended in argument that a Hindu medium lady was in so independent a position as regards her property as to disentitle her from the benefit of the presumption as to find but then Lordships held that though possibly her position was more independent than that of the Hindu partitioner she was equally secluded from the outer world and equally liable to undue influence on the part of her husband. They held accordingly that in the absence of proof of the husband having the means of purchasing the Company's paper, he being at the time in embarrassed circumstances and regard being had to the condition of the wife as a secluded woman, no purchase had taken place, and that the transaction was fraudulent as against her, *Moonshee Buleck Pukhun v. Shums onnessa Begum* 11 Moore's I. A., 551.

In *Tacoodeen Tiwary v. Natab Syed Ali Hossein Khan*, L. R., 1 I. A., 192, a Pinda lady living apart from her relations and natural advisers, having made a deed in favour of a person who had been acting as her agent on some occasions, the Privy Council held that the

latter was bound strictly to prove that the transaction was a *bona fide* one and fully understood by the lady.

In *Mannu Singh v. Umadat Pande*, I. L. R., 12 All., 523, a suit to set aside a deed of gift, it was shown that the defendant was the Guru or Spiritual adviser of the plaintiff and that the only reason for the gift was the good of the plaintiff's soul and because he had been affected by the reading of a holy book. It was held that as soon as the plaintiff had shown his relationship the onus of proving the transaction honest lay on the defendant.

The principles governing this subject were much discussed in *in re Biel's Estate; Gray v. Warner*, L. R., 16 Eq., 577. The matter in dispute was the validity of an agreement made between T. W., and E. D. B., who were co-executors. T. W., who had received all the assets, agreed, in consideration of £700, part of a legacy of £1,000, which had been left to E. D. B., his co-executor, whose life he knew was a bad one, to grant him an annuity. For the defendant, it was contended that E. D. B. and T. W., were dealing with each other on equal terms; and the former was not in the hands of the latter and that there was no fiduciary relation at all on the part of T. W. The Court, however, in giving judgment observed: "If a trustee purchases from a *cestui-que-trust* he takes upon himself the onus of proving the fairness of that transaction, and I cannot see that T. W. was relieved from that burden because his *cestui-que-trust* was also his co-executor. It is quite clear that T. W. had possession of the property during the lifetime of the testatrix, and that he had, after her death, the unlimited confidence of his co-executor. He knew all about the testatrix and his co-executor and the property, and he proved the will; and there is nothing in the case to induce me to hold that he could purchase from the legatee without taking upon himself the onus of establishing that the transaction was a fair one. The onus was not shifted by the fact that there was an agreement. In all these cases there are agreements. Then comes the question, has T. W. sufficiently shown that the transaction was a *bona fide* one? In my opinion it was fundamentally an unfair one. He purchased at an undervalue from a person who, he knew, was not able to protect himself, for at times he was incompetent, and whose life was a bad one. I therefore hold that the agreement is invalid; and that the money, if no arrangement be come to, must be paid into Court."

It is on the principle of this section that a purchase by an executor or administrator under the Indian Succession Act, of any of the property of the deceased is voidable at the instance of any other person interested in the property sold; Section 270.

For examples of what the Law would regard as indication of *mala fides*, see Contract Act, §§ 14—17.

112. The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Birth during marriage, conclusive proof of legitimacy.

Note.

"Non-access," must be taken to mean "non-access in a sexual sense" not merely non-residence in the same house: accordingly it would be open to a person wishing to prove the illegitimacy of a child to show either that the husband was impotent, or that the husband and wife had never met under such circumstances as would admit of sexual intercourse.

According to English law "when the legitimacy of a child is the question in dispute, the testimony of the parents, that they have or have not had connexion, has, on the same grounds of decency, morality and policy until recent times, been uniformly rejected by the judges. This rule has not been superseded and it excludes, not only all direct questions respecting access, but all questions which have a tendency to prove or disprove that fact, unless they are put with a view to some different point in the cause; and it applies to the depositions of the parents equally with their *viva voce* testimony."—*Tayl.*, § 950. See however, 32 & 33 Vic. c. 68, s. 3, and *in re Rideout's Trusts*, L. R., 10 Eq., 41; *in re Yearwood's Trusts*, L. R., 5 Ch. Div., 545. See *Burnaby v. Baillie*, 42 Ch. D., 282.

In proceedings by a married woman for the maintenance of her illegitimate children it was held that a wife may be examined to prove non-access of her husband during her married life, before independent evidence is offered to prove the illegitimacy of her children; *Rozario v. Ingles*, 1. L. R., 18 Bom., 468.

Where access is proved, the presumption of legitimacy cannot be rebutted.—The present section, however, reproduces the English law, so far as regards the rule, observed in English Courts, that where access is proved, the presumption of legitimacy cannot be rebutted by proof of adultery. The law will not allow a balance of evidence as to who was most likely the father of the child; *Banbury Peerage Case*, 1 S. & S., 153.

turns in this case upon the Indian Evidence Act of 1972, Section 113. The Governor General in Council being precluded by the Act 24 & 25 Vic c 67 Section 22 from legislating directly as to the sovereignty or dominion of the Crown over any part of its territories in India or as to the allegiance of British subjects could not by any Legislative Act purporting to make a notification in a *Government Gazette* conclusive evidence of cession of territory exclude enquiry as to the nature and lawfulness of that cession. The awkward fact remains that the Government of India has on various occasions made cessions of territory to Native States either in exchange for more conveniently situated territory or otherwise and its right to do so has never been doubted. The action of Parliament will be necessary to place the matter on a strictly legal footing.

114. The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case ⁽¹⁾

Court may
presume
existence of
certain facts

Illustrations

The Court may presume

(a) That a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. (2)

(b) That an accomplice is unworthy of credit unless he is corroborated in material particulars. (3)

(c) That a bill of exchange accepted or endorsed was accepted or endorsed for good consideration. (4)

(d) That a thing or state of things which has been shown to be in existence within a period shorter than that within which such things or state of things usually cease to exist, is still in existence. (5)

(e) That judicial and official acts have been regularly performed, (6)

(f) That the common course of business has been followed in particular cases, (7)

g) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it; 8

h) That if a man refuses to answer a question which he is not compelled to answer by law, the answer, if given, would be unfavourable to him; 9,

j) That when a document creating an obligation is in the hands of the obligor, the obligation has been discharged: (10)

But the Court sh^d. also have regard to such facts as the following, in considering whether such maxims do or do not apply to the particular case before them:—

As to Illustration (*a*).—A shop-keeper has in his till a marked rupee soon after it was stolen, and cannot account for its possession specifically, but is continually receiving rupees in the course of his business:

As to Illustration (*b*).—A, a person of the highest character, is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character who also took part in the arrangement, described precisely what was done, and admits and explains the common carelessness of A and himself:

As to Illustration (*b*).—A crime is committed by several persons. A, B and C, three of the criminals, are captured on the spot and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable:

As to Illustration (*c*).—A, the drawer of a bill of exchange, was a man of business. B, the acceptor, was a young and ignorant person completely under A's influence:

As to Illustration (*d*).—It is proved that a river ran in a certain course five years ago, but it is known that there have been floods since that time which might change its course:

As to Illustration (*e*).—A judicial act, the regularity of which is in question, was performed under exceptional circumstances:

As to Illustration (*f*).—The question is, whether a letter was

received. It is shown to have been posted, but the usual course of the post was interrupted by disturbances :

As to Illustration *(g)*,—A man refuses to produce a document which would bear on a contract of small importance on which he is sued, but which might also injure the feelings and reputation of his family :

As to Illustration *(h)*,—A man refuses to answer a question which he is not compelled by law to answer, but the answer to it might cause loss to him in matters unconnected with the matter in relation to which it is asked :

As to Illustration *(i)*,—A bond is in possession of the obligor, but the circumstances of the case are such that he may have stolen it.

Note.

(1) **Presumptions.**—"It was a favorite enterprise," observed Sir James Stephen at the passing of the Act, "on the part of the continental lawyers to try to frame systems as to the effect of presumptions, which would spare Judges the trouble of judging of facts for themselves by the light of their own experience and common sense. A presumption was an artificial rule as to the value and import of a particular proved fact. These presumptions were almost infinite in number, and were arranged in a variety of ways. There were rebuttable presumptions, and presumptions which were irrebuttable, *presumptiones juris, et de jure, præsumptiones juris and præsumptiones facti*. There was also an infinite variety of rules for weighing evidence: So much in the way of presumption and so much evidence was full proof: a little less was half full, and so on. Scraps of this theory have found their way into English law, where they produce a very incongruous and unfortunate effect and give rise to a good deal of needless intricacy." The present section sweeps away all the technicalities which in English law beset the subject, and lays down a simple rule of reasonable inference. Except in the case of the presumptions specially provided in the previous Sections 79—90 and in Chapter VII, it abolishes the presumption so far as it is "an artificial rule as to the value and import of a particular piece of evidence," and provides that the Court must, in each instance, draw a reasonable inference from all the facts of the case. In illustration of the rule a number of the most familiar presumptions of the English law are given and it is shown in the first half of the Illustrations how the Court might be justified in following them, and in the second, how other circumstances might justify the Court in setting them aside. In

each case the Judge must rely, not on any arbitrary rule, but on his own view of the probabilities of the case and he must shift the burden of proof accordingly. He may either at once draw the inference, which the facts of the case, according to the ordinary course of human events, *prima facie* suggest, and so throw the burden of proof on the party who denies that inference; or he may, with reference to some such consideration as those mentioned in the second half of the illustration, refuse to draw the inference and call for proof of it in the first instance from the person who asserts it.

It is to be observed that "the common course of natural events," which conduct "public and private business," the habits of the country, disposition and manners of the inhabitants, customs of trade, local usages, the general spirit and tendency of the existing law will have to be taken into account, and the probabilities in each case thus arrived at.

It was frequently been pointed out that there are numerous so-called "presumptions" which are merely laws under another form: e.g., the presumption that every one knows the law is only another way of enacting that no one shall be excused for ignorance of the law; the presumption that every one contemplates the natural effects of his own acts is tantamount to an enactment that the law does not care what a man may have contemplated, but will punish him for what he does. Frequently 'presumptions' may be seen turned into statutory law; for instance, there are certain presumptions in English law as to a testator's intentions, where he has made two bequests to the same person; these are to a great extent, repeated in the Indian Succession Act, Section 88, without any reference to a presumption. In the same way laws of Limitation used to be treated as presumptions that a claim, not put forward for a certain period, had been satisfied; and title by prescription, which is generally described as resting on the presumption of an ancient grant, is provided for by a specific enactment in Act XV of 1877, Section 27.

Such statutory presumptions belong, accordingly, not to the Law of Evidence, but to the ordinary substantive law on the subjects with which they are connected. There is a certain presumption as to desertions, for instance, provided by the Native Articles of War, (V of 1863, Section 114.) which is part of the Military law: certain presumptions as to the relations of husband and wife provided by Section 21 of the Native Convert's Marriage Dissolution Act, (XXI of 1866) which are a portion of the Law of Marriage: a presumption of pre-emption in all Punjab Village communities, Act IV of 1872, Section 11: a presumption in favour of a tenant's having a right of occupancy, Act XXVIII of 1868, Section 6; and a presumption that the breach

of a contract to transfer immoveable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved; specific Relief Act I of 1877, Section 12. These and other similar presumptions must be considered with reference not so much to the Law of Evidence as to the special law regulating the subject in each case.

The same observation applies to those numerous presumptions which the course of judicial decision has gradually come to recognize as binding rules. They belong strictly, not to the law of Evidence but to the substantive Law of the subject in question. Just as the statutory presumption as to the parentage of a child born in his parents' wedlock is part of the law of marriage and legitimacy; and the presumption that a man intends the natural consequences of his act is part of the law of crime: so the presumptions as to union, or partition, are a part of Hindu family Law, the experience of the Courts having established the character of a Hindu family to be such that from certain facts other facts concerning it ought as a necessary consequence to be inferred.

Presumptions are thus co-extensive with the entire field of law, and any attempt to give a complete summary of them must necessarily be incomplete. The presumption must, in each case, be sought under the particular head of law to which it refers. A few of the more familiar presumptions are enumerated below, more with a view of illustrating the wide bearing of the rule under consideration and the way in which it should be applied, than of attempting the impossible task of giving an exhaustive account of all the inferences to which the Courts have given judicial sanction.

Presumptions of Hindu Law. The whole property of an undivided Hindu family is presumed to be joint.—In India some of the most important presumptions are those raised in the case of the joint Hindu family. In such cases the presumption is that the *whole* property of the family is joint, and the *onus* lies upon a party claiming any part of such property, as his separate estates, to establish that fact; *Gopeekrist Gosain v. Gungapersaud Gosain*, 6 Moore's I. A., 53.

Presumptions of Hindu law apply to Khoja Mahomedans; *Mussumbhoy Ahmedbhoy v. Ahmedbhoy Hubbibhoy*, I. L. R., 12 Bom., 280.

The presumption of law is, that the whole of the property of an undivided Hindu family is in co-parcenary. The *onus* lies on a member of such family to prove that it was separately acquired; *Dhurm Das Pandey v. Mussumat Nhami Soonlri Dibiah*, 3 Moore's I. A., 229.

This presumption, however, may be attenuated or altogether destroyed by the circumstances and history of the family. Where,

for instance, the evidence shows that, though there is some ancestral property, some of the members have acquired separate funds and have dealt with those funds without reference to the other members of the family, the Judicial Committee held that such a state of things weakened or altogether rebutted the ordinary presumption, "and" "threw upon those who claim as joint property that of which they" "have allowed their co-parcener, trading and incurring liabilities on" "his separate account, to appear as the sole owner, the obligation of" "establishing their title by clear and cogent evidence;" *Bodh Singh Dudhuria v. Ganesh Chandra Sen*, 12 B. L. R., 326. Where there has once been a partition, the presumption is that it is extended to the whole of the family property; and the burden of proof lies on the person who asserts that any particular portion of the property remained undivided.

There is no presumption of Hindu Law as to the character of property, therefore a man who asserts that property left by a testator was ancestral property must accept the burden of proof; *Nanabhai Ganpatrar Dhairguran v. Achratbai*, I. L. R., 12 Bom., 122.

Although presumably every Hindu family is joint in food, worship and estate there is no presumption that every family possesses property. The plaintiff alleging there is joint property must prove it; *Tooleydas Ludha v. Premji Tricundas*, I. L. R., 13 Bom., 61.

The presumption is that, when a family is separate in residence and food, it is also separate in estate; *Kesabram Mahapatrar v. Nandkishor Mahapatrar*, 3 B. L. R., (A. C. J.), 7.

Presumption that a joint Hindu family retains that status.—Where an estate was originally ancestral, belonging to a joint and undivided Hindu family, the presumption of law that a family once joint retains that status can only be rebutted by evidence of partition, or acts of separation: and the *onus probandi* lies on the party who claims a share in such estate to prove that it is a divided family; *Mussumat Cheetha v. Baboo Miheen Lall*, 11 Moore's I. A., 369.

Presumption as to family remaining joint after separation by one member.—The separation of one member of a joint Hindu family does not in itself create a separation between the other members and cause a general disruption of the family, 12 C. L. R., 356; *Radha Churn Das v. Kripa Sindhu Dass*, 4 C. L. R., 428, (S. C.) I. L. R., 5 Cal., 474, dissented from.

Presumption that a debt incurred by the head of a joint Hindu family is a family debt.—A debt incurred by the head of a Hindu family, residing together is, under ordinary circumstances, presumed to be a family debt: but where one of the members is a minor, the

creditor, seeking to enforce his claim against family property, must show that the debt was incurred *bona fide*, and for the good of the family; *Tándvariya Muddali v. Valli Ammal*, 1 M. High Court Rulings, 398. "The question is, not whether there was any legal necessity for the sale, but whether the sale was to satisfy a debt which, if contracted by the father and left unpaid by him, the son would, under the Hindu law, be under an obligation to discharge;" *Per* Markby, J., in *Adurmoni Deyi v. Chowdhry Sib Narain Kur*, I. L. R., 3 Cal., 1, at p. 5.

Mere commensality raises no presumption that a purchase is made with joint funds.—When, however, one member of a Hindu joint family claims a share of property, purchased by another member, on the ground that it was purchased from joint funds, the Court held that, before it could be presumed from the fact of the members having lived in commensality that the property was purchased from joint funds, the plaintiff was bound to show that there were joint funds or other ancestral property from which such funds could be derived; *Khelut Chunder Ghose v. Koonj Lall Dhur*, 10 W. R., Civil Rulings, 333. Commensality alone is not enough to raise a presumption that property is joint; the existence of joint funds, out of which the property might have been purchased, must also be shown. See the cases collected by Mr. Norton, in the case, *Luximon Row Madasew v. Mullar Row Bajee*, 1 Norton, L. C., 191. The sole question is who paid the money? *Dhurm Das Pandey v. Mussamat Shama Soondri Dibiah*, 3 Moore's I. A., 229.

Presumptions as to necessity for sale of ancestral property.—In cases where there has been a sale of ancestral property, the question as to the burden of proving the necessity of the sale has been much discussed. In the case of *Hunoomanpersaud Panday v. Mussamat Babooee Munraj Koonweree*, 6 Moore's I. A., 393, it was laid down that the purchaser does not, in such cases, take upon himself the entire risk of the existence of a case of necessity for alienation. The purchaser "is bound to enquire into the necessities for the loan, and to satisfy himself as well as he can, with whom he is dealing, and that the manager is acting in the particular instance for the benefit of the estate. The question on whom the burden of proof lies in such suits is, their Lordships observe, not one capable of a general and inflexible answer; the presumption proper to be made will vary with the circumstances and must be regulated by, and be dependent upon them."

In *Modhoo Dyal Singh v. Golbur Singh*, 9 Suth. W. R., Civil Rulings, 511, the Judges laid down that, where a son, under the Mitakshara law, sets aside a sale by his father on the ground that it was

unnecessary and that he had never acquiesced, but the purchaser claims a refund of the purchase money on the ground that it went to the credit of the joint estate, or was applied to removing an incumbrance binding on the heir, the burden of proving such application lies on the purchaser. "It appears to me," said Peacock, C. J., "that the *onus* lies on the defendant (*i. e.*, the purchaser) to show that the purchase money was so applied. I do not concur in the decision which has been referred to from 2 Wyman's Reporter, p. 81, (*Muddun Gopal Thakoor v. Ram Buksh Pandee and others*) in which it is said that in the absence of evidence to the contrary it must be assumed that the price received by the father became a part of the assets of the joint family: if the father was not entitled to raise the money by sale of the estate, and the son is entitled to set aside that sale, the *onus* lies on the person, who contends that the son is bound to refund the purchase money before he can recover the estate, to show that the son had the benefit of his share of that purchase money."

Authority to adopt.—Where a testamentary document showed a distinct intention on the part of the testator that he should be represented by his daughter's line, *should that line continue*, but made no provision for his representation in case of the failure of the daughter's line, it was held that the same reasons, which justify a presumption in favor of an authority to adopt in the absence of express permission, are powerful to exclude the presumption of a prohibition to adopt when, on a new and unforeseen occasion, the religious duty arises: and that, a contingency having arisen, for which the testator failed to provide, the widow's power to adopt must be regulated by the ordinary legal presumption; *The Collector of Madura v. Moctoo Ramalinga Sathupathy*, 12 Moore's I. A., 397.

In *Rajah Chundunath Roy Bahadur v. Koor Govindnath Roy and others*, 7 M. J., 425, there Lordships in the Privy Council discussed several conflicting presumptions, which arose in the case, as to an authority to adopt, alleged to have been conferred on his wife, and authority to manage conferred on his mother, by the Rajah. The Rajah was shown to have been on ill terms with his mother, which suggested the inference that he would not confer such a power on her; but against this was put the consideration that it was natural that a revulsion of feeling should come over him as death approached and that he should desire reconciliation. Then it was argued, why should he entrust the management to his mother, whose management had so displeased him in his lifetime: to this it was replied that what had displeased him was her interference and her desire to manage, and that this was quite consistent with his thinking her the best person to manage after his death. Then the inference of invalidity

arising from non-registration was shown not to be a strong one: next the Committee discussed an inference, grounded on the fact that the adoption did not take place till six or seven years after the Rajah's death. This was explained by the fact that the widow had a daughter, and that, if that daughter had married and had a son, that son might have performed the funeral rites: and though the widow might have neglected her duty in waiting so long, the stronger her duty to adopt, the less likely was it that the Rajah would leave her without the power to adopt.

There is generally a presumption in favour of a childless Hindu empowering his widow to adopt; *Nagalutchmee Ummal v. Gopoo Nadaraju Chetty*, 6 Moore's I. A., 809.

Presumption that a Hindu family is governed by the law of its origin.—Where a Hindu family came from one part of India, attended by priests of its own persuasion, and settled in another, the presumption is that it would carry with it its own usages and school of Hindu law: and the *onus* of proving an interruption or cessation of such a state of things would lie on the person asserting that such an interruption or cessation had taken place.

Hindu families are governed ordinarily by the law of their origin and not by that of their domicile. In the case of a Mitakshara family residing in Bengal the presumption would be in favor of its being governed by Mitakshara law till the contrary was proved; *Sooren-dronath Roy v. Mt. Heeramonee Burnoneah*, 12 Moore's I. A., 81.

Hindu wife.—There is no presumption of authority to pledge the husband's credit in the case of a Hindu wife, living apart from her husband on account of his marriage to a second wife, or for any other insufficient reason; *Virāsvāmi Chetti v. Appāsvāmi Chetti*, 1 M. High Court Rulings, 375.

As to the presumption of agency in the case of a Hindu wife, so as to make her contracts binding upon the husband, see 1 *Norton, L. C.*, 9.

Re-grant of confiscated Impartible Raj.—Where an impartible Raj, which had descended for generations according to the rule of primogeniture, was confiscated for rebellion of the reigning Rajah, and twenty years afterwards granted to C, a younger member of the Rajah's family, it was held that, though the Zemindary must be regarded as the acquired property of C, yet that, in the absence of evidence of an intention to the contrary, the intention of Government must be taken to have been to restore the estate as it existed before confiscation, and that the grant to C was not the creation of a new tenure, but simply a change of tenant by *vis major*; *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*, 12 Moore's I. A., 1.

Where a son purchases property which his father had mortgaged and the mortgage had foreclosed this does not by itself raise such a presumption of *benami* as the Court can see on the other circumstances of the case going to show that the purchase was made by one on the part of the son. *Fac Per Chou Thuy v Lalunulun Mah med Hasin Chou Thuy* 9 B L R 406 S C 14 Moore's I A 234

It is however perfectly clear that in so far as the practice of holding lands and buying lands in the name of another exists, that practice exists in India as much among Mohammedans as among Hindus and the judgment in *Gaj Prasad Gossain v Gungtyastul Gossain* 6 Moore's I A 53 and the cases therein referred to are at all events authority for the propositions that the criterion of these cases in India is to consider from what source the purchase money comes, that the presumption is that purchase made with the money of A in the name of B is for the benefit of A and that from the purchase by a father whether Mohammedan or Hindu in the name of his son you are not at liberty to draw the presumption which the English law would draw, of an advancement in favor of that son. Again the mere fact that this property was purchased not in the sole name of the son but in the name of the wife as well as of the son affords a strong argument in favor of the hypothesis that it was a *Benami* purchase for there was no such community of interest between the wife and the son as would render it probable that they had been made joint owners of the property and the reason for putting two names rather than one into a trust applies almost as strongly in India as it would in this country. *Moulvi Syeed Ullah v Mussumat Bebi Ulfat Latif* 18 Moore's I A 202 at p 246 It seems, however that where property is purchased in the name of a Hindu wife there is no presumption as to whether it is or is not the property of her husband. *Chowdhani v Tannay Kanth Lahary Chowdhry* I L R 8 Cal 545

Presumption of advancement under English Law.—As to the presumption of advancement arising under English law in the case of a purchase by a father in a son's name the Court said in *Stock v McAdoo*, I R 15 Cl, 555 that the strong presumption is that the son is not a trustee and that this can only be displaced by evidence and an act of taking possession by the father is however sufficient to displace it in this case for instance the father called on the tenant and gave her notice to quit but afterwards allowed her to remain this fact coupled with receipt of the rents during his life by the father, was held sufficient to show that the son was a mere trustee for the father

Presumption as to suit instituted by a Benamidar.—A suit instituted by a benamidar must be presumed to have been instituted with the consent and by the authority of the beneficiary owner, and the decision will be binding upon the beneficiary owner; *Gopinath Ghobey v. Bhugw Persad*, I. L. R., 10 Cal., 697.

Marriage and Legitimacy.—The presumption as to marriage and legitimacy was discussed by the Judicial Committee in *Ramamani Annul v. Kalanthe Natchear*, 14 Moore's I. A., 846. In that case a ceremony of marriage had been gone through between a Sudra Zamindar and the first plaintiff, who alleged herself to be of the Vellala caste, but whom the defendants alleged to be a dancing girl. The Privy Council inferred that she was *not* a dancing girl, as, in that case, the ceremony would have been not only invalid but, from a Hindu point of view, profane; their Lordships also relied on the treatment which the second plaintiff, the son of the first plaintiff, had received at the hands of the Zemindar. It being shown that he was treated by the Zemindar as legitimate, the burden of showing that he was not legitimate was thrown upon the defendants.

According to Mahomedan law, while a marriage lasts, a child of the woman is taken to be the husband's: an ante-nuptial child is illegitimate, but may become legitimized by force of an acknowledgment, express or implied, directly proved, or presumed. The question for the Court in such a case is whether the treatment of the child furnishes evidence of acknowledgment. A Court would not be justified, though dealing with this subject of legitimacy, in making any presumptions of fact which a rational view of the principles of evidence would exclude. The presumption in favor of marriage and legitimacy must rest on sufficient grounds, and cannot be permitted to over-ride over-balancing proofs, whether direct or presumptive.

In *Khajjah Hilayat Ollah v. Rai Jan Khanum*, 8 Moore's I. A., 293, there was, their Lordships held, "a consecutive course of treatment, both of the mother and of the child, for a period of between seven and eight years, under circumstances, in which it appears to their Lordships to be next to impossible that such a mode of treatment would have been continued, except from the presumption on cohabitation, and of the son being the issue of the loins of Fyz Ali Khan:"—this their lordships held tantamount to an acknowledgment that such was the case.

In *Ashrafud Dowlah Ahmed Hosain Khan Bahadoor v. Hyder Hossein Khan*, 11 Moore's I. A., 94, the same question arose; coupled with the additional circumstance that the alleged father, after treating the child for some years as his legitimate son, had afterwards turned him out and executed a deed of renunciation whereby he

declared that he was not his son. On the whole their Lordships decided that the child's legitimacy was not proved. "The case, then," said their Lordships, (page 116), "must be determined on the principles of evidence which are applicable to presumptive proof, every reasonable legal presumption being made in favor of legitimacy. The force of presumptions of fact as evidence will vary with varying circumstances, and cannot well be fixed by decision. The Courts have properly presumed, in many cases, both marriage and acknowledgment; for to presume acknowledgment and to consider treatment as tantamount to it, is virtually the same thing. The loss or destruction of evidence by time or design is as likely to take place with respect to acknowledgment as with respect to any other subject; and whilst matters of the highest import are capable of being inferred and are inferred from circumstances, it would be a merely arbitrary limitation of legitimate inference to exempt this one subject from its operation;" In *Mahomed Barker Hoossain Khan v. Shurfoon Nissa Begum*, 8 Moore's I. A., 159, their Lordships observed: "In arriving at this conclusion, they wish to be distinctly understood as not denying or questioning the position that, according to the Mahomedan law, the law which regulates the rights of the parties before us, the legitimacy or legitimation of a child of Mahomedan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof either of a marriage between the parents, or of any formal act of legitimation. Here there is, to their Lordships' judgment, an absence of circumstances sufficient to found or justify such a presumption or such an inference."

Mere continual cohabitation, therefore, does not suffice to raise a presumption of marriage so as to legitimize the offspring: the fact of a marriage taking place excludes any presumption which the facts might raise of a previous marriage having taken place.

A Mahomedan cohabited for many years with a Mahomedan woman, who had been a prostitute and who lived in his house. At his death, she claimed to be his wife, and called witnesses to prove an actual marriage, but failed to establish this fact. It was held that the Court of last resort could not presume, in such circumstances, that a woman, once a concubine, had, merely by lapse of time, and propriety of conduct, become a wife, and that the ordinary legal presumption was that there had been no marriage; *Mussumat Tariyat-oll-Butool v. Mussumat Hoseinee Begum*, 11 Moore's I. A., 194.

Presumption in favor of everything necessary to give validity to a marriage.—In *Lopez v. Lopez*, I. L. R., 12 Cal., 706, the Calcutta High Court, Garth, C. J., and Wilson, J., observed: "We have now to decide this appeal in accordance with the law laid down by the

Full Bench, that the validity of the marriage in question is to be determined by the law of the Church of Rome. It is clear in this case that the parties intended to become husband and wife, and that a ceremony of marriage was performed between them by a clergyman competent to perform a valid marriage. But, the woman being the sister of the deceased wife of the man, it is clear upon the evidence that, according to the rules of the Church of Rome, a dispensation from the proper ecclesiastical authority was necessary to its validity while without such dispensation it would be invalid. If, in such a case, the burden of proving a dispensation lay upon the appellant who supports the marriage, we should have no hesitation in saying it was not proved. If the burden of proof was the other way, and the point was one to be decided upon the balance of evidence, we might probably have come to the same conclusion. But the presumption in favour of everything necessary to give validity to a marriage is one of very exceptional strength. The law on the subject was fully considered by the House of Lords in the case of *Piers v. Piers*, 2 H. L. C., 331. The question in that case was as to the validity of a marriage. The parties had intended to become husband and wife, and a ceremony of marriage had been performed between them by a clergyman, qualified to marry them. The validity of the marriage, in the place where it was performed, depended upon whether a special license had been previously obtained from the Bishop of the Diocese. The evidence against the issue of any such license was at least as strong as in the present case, but it was held that the presumption must prevail. The Lord Chancellor, Lord Cottenham, cites and adopts the language of Lord Lyndhurst in an earlier case, that the evidence to rebut the presumption must be "strong, distinct, satisfactory and conclusive." Lord Brougham says that it must be "clear, distinct, and satisfactory." Lord Campbell used similar expressions, and added as his opinion "that a presumption of this sort in favour of a marriage can only be negatived by disproving every reasonable possibility. I do not mean to say that you must show the impossibility of any supposition which can be suggested to support the validity of the marriage; but you must show that this is most highly improbable, and that it is not reasonably possible." Following the principle laid down in that case, we think we are bound to presume in the present case that the dispensation had been obtained which was necessary to remove the obstacle to this marriage on the ground of affinity. We, accordingly, hold that the marriage was not liable to be annulled on the ground that the parties to it were within the prohibited degrees."

Presumption from long acquiescence in a Will.—As to the presumptions arising in the case of an adoption under a will where

the adoption had been acquiesced in for a long series of years, their Lordships in the Privy Council, in *Rajendra Nath Holdar v. Jogendra Nath Banerjee*, 14 Moore's L. A., 67, made the following remarks (page 76): "We, therefore, find that for a period of twenty-seven years this will was, with the exceptions I have mentioned, acted upon and recognized by the whole of the family of Kalli Prosad Holdar, and that the legal status of the appellant was acquired under it with the knowledge of all the members of the family. If the document had been a fabrication, and if there were persons who might have intervened and have contested the will, the presumptive heir, who was in existence before his title was defeated by the birth of the present contesting respondent, might have come forward in one way or another and contested the will. Therefore, there arises, from all these circumstances, a very strong presumption, which their Lordships do not feel themselves at liberty to disregard, in favor of the will. No doubt these circumstances, as the law stands, are not conclusive against the first respondent. He has the right to call upon the appellant, the defendant in the suit, to prove his title; but their Lordships cannot but feel that while he has this extreme right, every allowance that can be fairly made for the loss of evidence during this long period, by death or otherwise—every allowance which can account for any imperfection in the evidence—ought to be made; and, on the other hand, that in testing the credibility of the evidence which is actually given, great weight should be given to all those inferences and presumptions which arise from the conduct of the family with respect to the will and to the acts done by them under the will. The case seems to their Lordships to be analogous to one in which the legitimacy of a person in possession is questioned, a very considerable time after his possession has been acquired, by a party who has a strict legal right to question his legitimacy. In such a case, the defendant, in order to defend his status, should be allowed to invoke against the claimant every presumption which reasonably arises from the long recognition of his legitimacy by members of the family or other persons. The case of a Hindu claiming by adoption is perhaps as strong as any case of the kind that can be put; because when, under a document which is supposed and admitted by the whole family to be genuine, he is adopted, he loses the rights—he may lose them altogether—which he would have in his own family; and it would be most unjust after a long lapse of time to deprive him of the status, which he has acquired in the family into which he has been introduced, except upon the strongest proof of the alleged defect in his title."

Testator's approval of his Will.—The fact that a will was duly read over to a capable testator, or otherwise brought to his notice, on the occasion of its execution, coupled with his execution of it, is, in the

absence of fraud, conclusive proof of his approval, as well as of his knowledge of the contents; *Guardhouse v. Blackburn*, L. R., 1 P. & D., 109, at page 116. For an example of evidence held not to be sufficient to justify the setting aside of a will, see *Chotry Narain Singh v. Ratan Koor*, L. L. R., 22 Cal., 519.

Alterations in document.—The following summary of the presumptions of English law as to alterations is given by Sir J. Stephen, Art. 89.

1. "Alterations and interlineations appearing on the face of a deed are, in the absence of all evidence relating to them, presumed to have been made before the deed was completed."

2. "Alterations and interlineations, appearing on the face of a will, are in the absence of all evidence relating to them, presumed to have been made after the execution of the will."

3. "There is no presumption as to the time when alterations and interlineations appearing on the face of writings not under seal were made, except that it is presumed that they were so made that the making would not constitute an offence."

As to the presumption in case of an unattested alteration in a will, see *Cooper v. Bockett*, 4 Moo. P. C., 419.

Where a will is executed in several separate sheets and the last only is attested, the presumption is that all the sheets were in the room at the time of attestation; *Williams on Executors*, (9th ed.), pp. 72, 73. Where in a will 15 sheets followed each other numbered consecutively, and the 14th had been removed, and the 17th substituted, the Court presumed that this was so at the time of execution; *Rees v. Rees*, L. R., 3 P. & D., 84. So the destruction or mutilation of a will raises a presumption of the revocation of a codicil; but this may be rebutted by showing that the testator intended the codicil to operate notwithstanding the revocation of the will. *Williams' Executors*, (9th ed.), pp. 131, 132.

Legatee's knowledge of his right to elect.—Section 174 of the Indian Succession Act raises a presumption in favor of a legatee's knowledge of his right to elect or of his waiver of enquiry, if he has for two years enjoyed the benefits provided by the will without doing any act to express dissent.

Presumption of election from acquiescence in the transfer of property is dealt with in the Transfer of Property Act, IV of 1882, § 85.

Actions for negligence.—In actions or prosecutions for negligence, the mere fact of injury having been occasioned is not enough to throw

the burden of disproving negligence on the defendants: as, *e.g.*, if a person sues for injuries inflicted by a carriage in the streets, he must show that the accident arose from the defendant's negligent driving. An accident, however, may occur under circumstances which throw the burden of disproving negligence on the defendant in the first instance: as *e.g.*, where a barrel was let fall from a window on the plaintiff as he was walking in the streets; *Byrne v. Boadle*, 38 L. J., Ex., 13.

Collisions at Sea.—"Certain presumptions are again, in maritime cases, made by the Admiralty Division of the High Court, which technically shift the burthen of proof. Thus, if two vessels come into collision, of which one was at anchor or "in stays" at the time, the fact so far raises a presumption in her favour that she is so far presumed to be without blame; and the burthen of proof rests on the opposite side to establish, either that the other vessel was to blame or had been improperly put "in stays," or that the damage was occasioned by stress of weather, or by other unavoidable accident. Again, in the case of a collision between two ships, if the master of either ship fail to render assistance to the other, and to stay by her for that purpose, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by the wrongful act of the defaulter. Moreover, the infringement of any regulation for preventing collisions at sea, made under the Merchant Shipping Act 1894, raises a presumption of blame as against the infringer, unless he can show either that circumstances "made a departure from the regulation necessary" or that the infringement charged could not by possibility have contributed to the collision. Again, if a salvor's vessel be injured or lost while engaged in a salvage service, the Admiralty Division presumes, *prima facie* that such injury or loss was caused by the necessities of the service, and not by the salvor's default." *Tayl.*, § 206.

Sanity.—Sanity is presumed, but insanity once proved, the burden lies on the assertor of a lucid interval to prove it.

Vendor's intention to preserve his *jus disponendi* by making bill of lading deliverable to his order.—The fact of a vendor, when consigning goods, making a bill of lading deliverable to the order of himself, is *prima facie* evidence of his intention to preserve his *jus disponendi* and to prevent the ownership passing to the purchaser. This presumption, however, may be rebutted by showing that the vendor, in making the bill of lading payable to his order, did so as agent for the purchaser, and did not intend to retain control of the property; *Turner v. Trustees of Liverpool Docks*, 6 Ex., 543, Benj., 4th ed., pp. 356, 359.

Bill of exchange infected with fraud or illegality.—Where it is shown in cases of suits in bills of exchange by defendant's evidence that a bill was originally created with fraud or illegality, then the title of the original holder and that of every other holder which reposes on him the being destroyed, the burden lies on the plaintiff to show that he or some person under whom he claims, gave value for the bill. But when the question is whether the plaintiff, the transferee *had notice* of the original illegality or fraud, and the plaintiff has shown that he gave value, then, if the defendant wants to impeach plaintiff's title by alleging notice of fraud or illegality, it is for defendant to prove it; *Diges v. Dyer*, 15th edn., 141. *Tatum v. Haslar*, 23 Q. B. D., 345.

Stamp.—Where a document is required by law to be stamped at the time when it is received by the holder, and the document is produced in Court duly stamped, the presumption is that it was duly stamped when received, and the onus is on the other party to show that it was not; *Bridlepath v. Dutton*, 37 L. J., C. P., 146. But when once satisfactory evidence has been given that at a particular time the instrument was unstamped, there is an end of any presumption of law in favour of its having been stamped, the onus of proof is shifted, and the party who relies on the instrument must prove it to have been duly stamped; *The Marine Investment Company v. Harbidee*, L. R., 5 H. L., 624.

Presumption as to Mal Lands in Resumption suits.—Where in a resumption suit the defendant alleges the land to be lakhiraj, the burden of proof is on the plaintiff to show that is a *mal*; and the facts that the defendants are the plaintiff's tenants for certain mal lands, and that the lands in suit are shown to be within the ambit of the plaintiff's zemindari do not suffice to shift the onus; *Bachchan Meendal v. Peary Mohan Banerjee*, I. L. R., 9 Cal., 815, following the rule laid down by the Privy Council in *Hurryhar Mukhopadhyay v. Mohini Chunder Dutt*, 14 Moore's I. A., 153.

Presumption of lost Grant. Sir James Stephen mentions, Art. 100, the rule of English law that, where a person has for a long period of time exercised a proprietary right, which might have had a legal origin by grant or licence from the crown or a private person, and the exercise of which would naturally have been prevented, if it had not had a legal origin, there is a presumption that such right had a legal origin and that it was created by a proper instrument which has been lost.

Forests in the Punjab.—There is a presumption in the Punjab that, in Regular Settlements made before 1st June 1872, all forests,

unclaimed, unoccupied, deserted or waste lands, quarries, spontaneous produce and other accessory interests in land (whether included within the boundaries of an estate or not) belong to Government, unless provision is expressly made to the contrary. See Act XXXIII of 1871, Sec. 28. The section further points out how this presumption may be defeated.

(2) **Presumption in case of recent possession of stolen articles.**—“The question,” says Mr. Taylor, Section 127, “as to what amounts to recent possession varies according as the stolen article is or is not calculated to pass readily from hand to hand. Thus, where the only evidence against a prisoner was that certain tools were traced to his possession three months after their loss, the Jury has been directed to acquit: in the same way possession of a horse six months after its loss, has been held not to justify a conviction for theft. Of course, the presumption is very much weakened when actual possession is not proved, but stolen property is merely found in an accused person’s house, as others may have placed it there. A similar presumption is raised by recent possession in the case of other offences: *e.g.*, in a case of arson, the fact of property, which was in the house at the time it was burnt, being soon afterwards found in the prisoner’s house, was held to raise a presumption that he was present and concerned in the offence.—*Tayl.*, § 127 A—C.

In cases in which murder and robbery have been shown to form parts of one transaction it has been held that recent and unexplained possession of the stolen property while it would be presumptive evidence against a prisoner on the charge of robbery would similarly be evidence against him on the charge of murder; *Queen-Empress v. Sami*, I. L. R., 18 Mad., 426.

The second part of the Illustration, ‘as to Illustration (a)’ gives an instance of circumstances under which recent possession raises no presumption of guilt.

(3) **Presumption as to untrustworthiness of accomplice.**—Section 133, *post*, provides that an accomplice shall be a competent witness, and that a conviction shall not be illegal merely because it is grounded on the uncorroborated evidence of an accomplice. The second part of the Illustration, ‘as to (b),’ gives a case in which the Court might with propriety disregard the ordinary presumption of untrustworthiness raised in such cases.

The jury must be told that the witness is an accomplice; *Queen-Empress v. O’Hara*, I. L. R., 17 Cal., 642. See too *Queen-Empress v. Maganlal*, I. L. R., 14 Bom., 115.

(4) **Presumption as to consideration of Promissory Notes and Bills of Exchange.**—This presumption has now been specially provided

by the Negotiable Instruments Act, XXVI of 1881, § 118. The English law raises this presumption in the case of Promissory Notes and Bills of Exchange, "partly because it is important to preserve the negotiability of such instruments intact, and partly because the existence of a valid consideration may reasonably be inferred from the solemnity of the instruments themselves and the deliberate mode in which they are executed."—*Tagl.*, § 148.

In the second part of the Illustration, the presumption that a Bill of Exchange was drawn for good consideration is rebutted by the fact that the relation of the parties is suggestive of unfair advantage. The effect of such relations was described in the case of *Earl of Aylesford v. Morris*, L. R., 8 Ch., 481, in which the Lord Chancellor observed on the presumption arising "from the circumstances and conditions of the parties contracting—weakness on one side, extortion or advantage taken of that weakness on the other—a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as, *prima facie*, to raise this presumption, the transaction cannot stand, unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just, and reasonable."—See also Section 111. Where professional money lenders sued a young man recently come of age on promissory notes, which he alleged to have been given without, or for immoral, consideration it was held; (1) that the onus of proving consideration was on the money-lenders; (2) that where they alleged consideration and were corroborated by their books and witnesses the onus shifted to the defendant; (3) that this onus can be met only by "a perfectly truthful and harmonious statement which the Court feels able to rely upon with confidence;" *Moti Gulabchand v. Mahomed Mehdi Tharia Topan*, I. L. R., 20 Bom., 867. The law of any foreign country regarding negotiable instruments is presumed to be the same as that of British India until the contrary is proved. Negotiable Instruments Act, 1881, § 187.

(5) **Presumption as to continued existence of a thing or state of things.**—The application of this presumption is expressly provided for, in certain cases, under Section 109. As to this presumption, see *Price v. Price*, 16 M. & W., 242.

Presumption of continued possession.—Land is often incapable, temporarily or permanently, of actual enjoyment in any of the ordinary modes, as by tillage, residence or receipt of rents. It may be inundated, or covered by jungle. In such cases all that is required to show possession is that the plaintiff should prove such acts of ownership as

are natural under the circumstances: and, where lands are by natural causes, *e.g.*, by diluvion, placed wholly out of the reach of their owner, if the plaintiff shows his possession and control up to the time of the diluvion, his possession is presumed to continue so long as the lands continue to be submerged; *Mahomed Ali Khan v. Khaja Abdul Gunny*, I. L. R., 9 Cal., 751, following *Kally Churn Sahoo v. The Secretary of State*, I. L. R., 6 Cal., 725, and *Mono Mohun Ghose v. Mothura Mohun Roy*, I. L. R., 7 Cal., 225. In *Mahomed Ali Khan v. Khaja Abdul Gunny*, the Full Bench laid down, as the proper rule, that where land is shown to have been in a condition unfitting it for actual enjoyment in the usual modes, at such a time and under such circumstances that that state naturally would, and probably did, continue till twelve years before suit, it may be presumed that it did so continue and that the plaintiff's possession continued also. This rule the Full Bench consider to be in accordance with that laid down by the Judicial Committee of the Privy Council in *Radha Govind Roy v. Inglis*, 7 Cal., L. R., 364. See too *Mohinny Mohun Das v. Krishna Kishore Datt*, I. L. R., 9 Cal., 802.

The presumption in such a case is by no means conclusive, and its bearing upon each particular case must depend on the circumstances. Garth, C.J., would carry the presumption further and apply it, not only to any particular kind of land, jungle, diluviated, &c., but to all land, on the principle that "where seizin of an estate is shown, its continuance will be presumed," and that what the plaintiff has to show is not necessarily in all cases, possession within twelve years, but that *his cause of action arose* within twelve years. See observations of Melvill, J., in *Pandurang Govind v. Bal Krishna Hari*, 6 Bom., Ac., 125.

Presumption as to continuance of possession. - Though, as a general rule, a plaintiff, who sues on the ground of dispossession, must show possession and dispossession within twelve years of the suit; *Maharajah Koonwur Daboo Mitrasur Singh v. Baboo Nund Loll Singh* (8 Moore's I. A., 199), yet there may be circumstances, under which, in the absence of direct proof, the Court may presume continuance of possession, and cast upon the defendant the burden of proving its cessor. In the case of diluviated land which has reformed, where a plaintiff proves possession, up to the diluviation, and the facts of the case favor the view that submergence continued to within the prescribed period, the Court will presume, in the absence of proof to the contrary, that it did so continue, the ground of the presumption being that the nature of the property did not admit of actual and tangible possession, and, in such a case, the fact of ownership may give rise to a presumption of possession; *Mano Mohun Ghose v. Mothura Mohun Roy*, L. R., 7 Cal., 227. See *Radha Gobind Roy v.*

Inglis, 7 Cal., 364, (P. C.) where the burden of proving possession for twelve years in the case of a lake, which had dried up, was thrown on the person setting up adverse possession, not on the original owner. In a more recent case plaintiff's title to land covered by water was affirmed in 1857; afterwards the water silted up and the defendant was in possession for ten years before action brought; held that there was a presumption that the plaintiff's title endured till the defendant's began; *Rajkumar Roy v. Gobind Chunder Roy*, I. L. R., 19 Cal., 660; see too *Mohiny Mohun Das v. Krishna Kishore Dutt*, *supra*, p. 329.

(6) **Presumption as to the regular performance of judicial and official acts.**—Some of these presumptions have been expressly provided for, as to documents, in Chapter V. Sections 79—90. The following instances are mentioned by Mr. Broom; (*Legal Maxims*, 6th ed., p. 839), "that a man, acting in a public capacity, was properly appointed and is authorized so to do.....that Judges and Jurors do nothing causelessly and maliciously:.....that facts, without proof of which the verdict could not have been found, were proved at the trial: that the decision of a Court of competent jurisdiction was right."

In England the presumption does not apply, so as, in any event, to give jurisdiction to inferior Courts or to Magistrates or others acting judicially under a special statutory power; but in all such cases, every circumstance required by the Statute to give jurisdiction must appear on the face of the proceedings, either by direct averment or by reasonable intendment. *Tayl.*, § 147. No such provision being retained in the present Act, it is apprehended that a Judge would be at liberty, under this section, to presume jurisdiction in any case in which the circumstances did not raise a presumption to the contrary.

Where the officers of a municipality failed to produce any record of having served notices ten or fourteen years before it was held that no presumption that they had not been served was to be drawn; *Municipality of Sholapur v. Sholapur Spinning & Weaving Coy.*, I. L. R., 20 Bom. 732. Before the deposition of a medical witness taken by a committing magistrate can be given in evidence under Sec. 509 of the Criminal Procedure Code it must be proved to have been taken and attested in the presence of the accused. It should not be presumed to be in order under this section; *Queen-Empress v. Riding*, I. L. R., 9 All., 720; see *Queen-Empress v. Paph Singh*, I. L. R., 10 All., 174; *Kachali v. Queen-Empress*, I. L. R., 18 Cal., 129.

(7) **Presumption that the common course of business has been followed.**—The receipt of rent, after the expiration of an old lease, raises a legal presumption of a new tenancy from year to year.

Servants, where nothing to the contrary appears, will be presumed to have been hired on the terms usual in the locality where they are employed.

Telegrams are presumed to be correctly transmitted, Section 88: letters are presumed to have been posted according to the Postmark; and a letter duly posted will be presumed to have reached its destination: As to the presumption in the case of letters shown to have been entered in due course in a letter receipt or despatch book, see Section 16 and note to Illustration (b). The question of the weight to be attached to the fact that a letter was posted as evidence of its having been received was discussed in *Wall's Case, In re The Imperial Land Company of Marseilles, L. R., 15 Eq., 18*: it was proved that the letter was despatched and that other letters, similarly sent, arrived duly, and the Court held that the unsupported statement of the addressee, denying its receipt, was not sufficient to get rid of the strong presumption that the letter had arrived at its destination. There was some evidence of unbusiness-like conduct on the part of addressee and also of his having been in a confused state of mind, and the Court, accordingly, though not disputing his respectability, found that the letter had been received.

(8) Producidble evidence, not produced, presumed to be unfavorable to person withholding.—So, in the case of a trustee or agent or other person liable to account, destroying accounts, or failing to keep proper accounts, the strongest presumption, of which the nature of the case admitted, would be made against him. So, also, where the person in command of a ship, affecting to be neutral, destroys her papers, there is presumption against her neutrality. In the same way, on the principle that *omnia presumuntur contra spoliatorem*, where the finder of a lost jewel refuses to produce it, the presumption raised against him is that it is of the highest value of its kind; his conduct is attributed to the knowledge that the truth would operate against him.—*Tayl., § 116; Armory v. Delamire*, Smith's L. C., (10th ed.), p. 343. In *Dhunno Kazi v. Empress*, 10 Cal., L. R., 153, 1. L. R., 8 Cal., 121, a distinction is drawn between the position of the prosecution and the accused as to non-production of evidence which might be produced. The learned Judges must not be understood as intending to lay down that in no case must an inference unfavourable to the accused be drawn from his withholding evidence which he might produce,—a proposition which could not be supported. See too *Queen-Empress v. Tulla*, 1. L. R., 8 All. 904, and *Hurry Churn Chuckerbutty v. The Empress*, 1. L. R., 10 Cal. 140.

Witness not appearing.—A strong inference is often to be drawn against a party who does not come forward as a witness: *e.g.*, in

Rughoobur Dutt Chowdhry v. Futteh Narain Chowdhry, 7 M. J., 345, the plaintiffs proved the execution of a bond by their own evidence and that of five attesting witnesses. Against this the defendants, set up a counter-case of forgery, supporting it by hearsay and untrustworthy evidence, but not directly contradicting the plaintiff, and not venturing themselves into the witness-box, to deny the signature. The Original Court found for plaintiff, but the High Court reversed the decision: the decision of the High Court was reversed by the Judicial Committee.

(9) **Presumption in case of refusal to answer questions.**—As to the inference to be drawn from a witness' refusal to answer questions as to character, see Section 148. See also Criminal Procedure Code, Section 348 as to inference from an accused person's refusal to answer.

(10) **Presumption of discharge of obligation where document is with obligor.**—This presumption was previously sanctioned by the Courts of this country. "A bill having got back into the acceptor's hands is presumed to have been paid:—it is sufficient evidence of payment for the acceptor to produce the bill;" *Shearman v. Fleming*, 5 B. L. R., 619.

Presumption in case of encroachment by a tenant.—An encroachment by a tenant on land adjoining to, or even in the neighbourhood of his holding, is presumed to be made for the benefit of the landlord: and if by adverse possession he acquires a title, he acquires it for his landlord and not for himself, unless it be distinctly shown that he has made the encroachment adversely to his landlord; *Nuddya Chand Shaha v. Meeran*, I. L. R., 10 Cal., 820.

Presumption as to intention in payment, where there is a charge.—In *Adams v. Angell*, 5 Ch. D. 684, it was held that the question, whether a mortgage, paid off, was kept alive or extinguished, depended upon the intention of the parties. The master of the Rolls in delivering his judgment, stated that "in a Court of Equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If it is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance, for, although he has not declared his intention of keeping it alive, it is presumed that his intention was to do so, because it is manifestly for his benefit. On the other hand, when the owner of an estate in fee or in tail pays off a charge, the presumption is the other way; but in either case the person paying off the charge can, by expressly declaring his intention, either keep it alive or destroy it. If there is no reason for keeping it alive, then, especially in the case of an owner in

fee, equity will, in the absence of any declaration of intention, destroy it; but if there be any reason for keeping it alive, such as the existence of another incumbrance, equity will not destroy it."

For Presumptions of fraudulent transfer of immoveable property for inadequate consideration, see the Transfer of Property Act, IV of 1882, s. 53.

For Presumption as to the relief necessary to compensate for breach of contract to transfer moveable and immoveable property, see Specific Relief Act, I of 1877, s. 12.

CHAPTER VIII.

ESTOPPEL.

115. When one person has, by his declaration, Estoppel.
act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

Illustration.

A intentionally and falsely leads B to believe that certain land belongs to A, and thereby induces B to buy and pay for it.

The land afterwards becomes the property of A, and A seeks to set aside the sale on the ground that, at the time of the sale, he had no title. He must not be allowed to prove his want of title.

Note.

"**Estoppel,**" it has been said, "is a branch of law once tortured into a variety of absurd refinements," and the subject is still, under the English system, somewhat beset with technicality. Estoppel is said to arise when "one man is concluded and forbidden in law to speak against his own act or deed, though it be to say the truth;" *Termes de la Ley tit, Estoppel*: and it differs from conclusive proof in that, when a thing is conclusively proved, it is so against all the world, whereas estoppel operates only as a personal disability, disabling a particular individual from asserting or denying certain facts. See *Wood v.*

Dwarris, 11 Exch., 498. A man, it was said by Lord Kenyon, shall not be permitted "to blow hot and cold" with reference to the same transaction, or insist at different times on the truth of each of two conflicting allegations according to the promptings of his private interest. According to the English law-books there are three kinds of estoppel, (1), by matter of record; (2), by deed; (3), by matter *in pais*. The most important instance of the first of these classes is where a man is bound by a judgment of the Courts, for which provision is made in Section 40 of the present Act. Estoppel by deed is grounded on the principle that "a deed is the most solemn and authentic act that a man can possibly perform with relation to the disposal of his property; and, therefore, a man shall always be estopped by his own deed, or not permitted to aver or prove anything in contradiction to what he has once so solemnly and deliberately avowed." 2 Blackstone's Comm., 295. A mere general recital, however, has not the effect of creating an estoppel: but the rule is held to preclude a party to a deed, who appears by it to have agreed to a certain state of facts as the basis on which he contracts, though but by way of recital, from averring the contrary; *Young v. Raincock*, 7 C. B., 310. Estoppel by matter *in pais* arose when some act of a party was deemed to preclude him from afterwards setting up a contrary state of facts.

Under the present Act these distinctions are not preserved, and the only estoppel known to the law of this country is that provided by this and the two following sections. The present section re-enacts the law with regard to estoppels *in pais* as laid down in *Pickard v. Sears*, 6 A. & E., 469, and further explained in *Freeman v. Cooke*, 2 Ex., 654. The general rules, of which this section is the embodiment, were categorically laid down in *Carr v. London & N. W. Company*, L. R., 10 C. P., 816. The general principle underlying all the cases is that a man shall not be allowed, as between himself and another person, to repudiate his own representations, oral or by way of conduct, active or passive, on which that other person has been induced or allowed to act. The rule is of very general application. "It is a principle of natural equity," it was observed by the Judicial Committee, "which must be universally applicable, that, where one man "allows another to hold himself out as the owner of an estate, and a "third person purchases it for value from the apparent owner in the "belief that he is the real owner, the man who so allows the other to "hold himself out shall not be permitted to recover upon his next "title, unless he can overthrow that of the purchaser by showing "either that he had direct notice or something which amounts to "constructive notice of the real title, or that there existed circum- "stances which ought to have put him upon an inquiry that, if

"prosecuted, would have led to a discovery of it;" *Ram Cumar Kunda v. John and Maria McQueen*, 11 B. L. R., 53. Upon the same principle, where members of a joint Hindu family, being aware of a transaction with the joint property by the manager, or one of their body, acting ostensibly as owner, lie by, they cannot afterwards repudiate it. *Norton's L. C.* 202.

So a Hindu heir may, by defending a *pro forma* suit for possession, brought against his mother by the purchaser of family property, estop himself from subsequently suing to set aside the sale as having been made without necessity; *Keshul Kristo Das v. Ram Kumar Saha*, 9 W. R., (Civil Rulings), 571.

So, again, where beneficial owners permit a *benamidar* to deal with the property as his own and borrow money on it, they cannot recover from the lender who has acted in good faith and obtained a decree in satisfaction of which the land is sold; *Nundum Lal v. Taylor*, 1 W. R., (Civil Rulings), 37.

In the same way, in *Munno Lal v. Lalla Choonee Lal*, L. R., I. A., 144, 21 W. R., 21, a mortgagee, who, when asked by an intending purchaser of the mortgaged property whether it was encumbered, said that he had no lien on it, was held by the Judicial Committee to be precluded from advancing his claim.

Where a man always represented that certain property belonged to his wife, his heirs were estopped from depriving the purchaser from the wife of it after his death; *Luchmun Chunder Geer Gossain v. Kallu Churn Sing*, 19 W. R., 292; but this case is to be distinguished from *Sarat Chunder Dey v. Gopal Chunder Laha*, *post*, p. 341, by the fact that here the husband never himself held the title to the property in his own name, whereas there he never held out his wife as the owner of the property and never parted with the possession; see L. R., 19 I. A., pp. 210, 211; see too *Chunder Coomar v. Hurbuns Sahai*, I. L. R., 16 Cal., 137. According to English law a woman, to whom goods have been supplied on the strength of her representations that she was a single woman, may get rid of her liability by showing that, at the time of the contract, she was married; because, it is said, her misrepresentation does not affect her incapacity to contract. This exception is not preserved under the present law; and, apparently, whenever a woman can be sued, she will be estopped, under this section, from denying any representation by which she has succeeded in obtaining credit.

On the same grounds persons, who misrepresent their authority to act, and induce other people to act on their misrepresentation, must make good their representation. Thus, in *Collen v. Wright*, 8 E. & B., 647; W, professing to act as agent for G, made an agreement for

the lease of a farm belonging to G, and signed it "W, agent to G, lessor." On these facts it was held that there was a contract on the part of W, that he had authority, on which his representatives were liable.

The same rule would apply in cases in which the belief was caused or allowed by a man's agent, acting within the scope of his duties; and this, although the principal was no party to the misrepresentation or concealment, or even was himself deceived.

There may, however, be circumstances in which a person will not be precluded from setting up a different state of facts from that previously asserted. For instance, a natural mother, a widow, who had caused the adoptive mother and son to be entered in the proprietary column of the certificate of her husband, was held not to be estopped, from asserting her right of inheritance to her natural son, on the adoption being found to be invalid; *Mt. Oodley Konwar v. Mt. Ladoo*, 13 Moore's I. A., 585. For a case where a man's brother was estopped from questioning the validity of the adoption of his adopted son; see *Sadashiv Moreshrar Ghate v. Hari Moreshrar Ghate*, 11 Bom. H. C., 190.

A mortgagee, who purchases, at a sale in execution of his mortgage decree, the right, title and interest of his mortgagor, is affected by any estoppel which affects the mortgagor, in asserting his title against third parties; *Poresnath Mookerjee v. Anathnath Deb*, L. R., 9 I. A., 147; I. L. R., 9 Cal., 265, P. C. Where a trustee mortgaged land without giving notice of the trust, and the mortgagee secured a decree for the sale of the land, the trustee was held to be estopped from asserting his title; *Gulzar Ali v. Fidar Ali*, I. L. R., 6 All., 24.

But the simple fact of purchase at an execution-sale does not make the purchaser "the representative" of the judgment-debtor for the purposes of this section; *Lala Parbhu Lal v. Mylne*, I. L. R., 14 Cal., 401; and see *Bashu Chunder Sen v. Enayot Ali and another*, I. L. R., 20 Cal., 236. Defendants who allow property to be sold under an execution without putting forward their claim to it and who afterwards receive the surplus of sale are not thereby estopped from setting up their title—unless they induced bidders to believe that they did not claim it; *Gurupadapa v. Irapa*, I. L. R., 14 Bom., 558. Similarly a person who bids at an auction sale for property which he has claimed and still claims as his own is not thereby estopped from subsequently claiming the property from the purchaser; *Gheran v. Kung Behari*, I. L. R., 9 All., 413.

The law as to estoppel as prevailing under this section has been very ably summed up by Lord Shand in *Sarat Chunder Dey v. Gopal Chunder Laha*, L. R., 19 I. A., 203; I. L. R., 20 Cal., 296.

The facts are as follows : Umed Ali made a gift of certain property to his wife Arjee Bibi by hiba held to be invalid : after his death she mortgaged the property, and on an auction sale under a decree it was bought by the appellants' predecessor in title. Afterwards Ahmed Hossein and Rahimunnissa Bibi, the son and daughter of Umed Ali and Arjee Bibi, sold their rights in the property to the respondents. It was held that Ahmed Hossein having acted as moktear to Arjee Bibi and having executed a mortgage in her behalf and in her name and received the mortgage money, was estopped from denying her title to the mortgaged property whether he was aware of its invalidity or erroneously believed it to be valid ; there was a distinct representation by Ahmed, professing to act as his mother's attorney, that she was owner in possession having a good title to create a valid mortgage, the transaction was concluded on the footing of that representation and the creditor was thereby induced to lend the money on the security of the mortgage : inquiry as to the title of Arjee Bibi to grant the mortgage in virtue of the liba in her favour was made quite unnecessary by the representation and conduct of Ahmed. This section "does not make it a condition of estoppel resulting that the person, who by his declaration or act has induced the belief on which another has acted, was either committing or seeking to commit a fraud, or that he was acting with a full knowledge of the circumstances, and under no mistake or apprehension" ; the law of England and the law of India on the matter are the same and the former "gives no countenance to the doctrine that in order to create estoppel the person whose acts or declarations induced another to act in a particular way must have been under no mistake himself, or must have acted with an intention to mislead or deceive. What the law (*i.e.*, the English law) and the Indian statute mainly regard is the position of the person who was induced to act, and the principle on which the law and the statute rest is, that it would be most inequitable and unjust to him that if another, by a representation made, or by conduct amounting to a representation had induced him to act as he would not otherwise have done, the person who made the representation should be allowed to deny or repudiate the effect of his former statement, to the loss and injury of the person who acted on it." This decision expressly overrules those arrived at in *Ganga Sahai v. Hera Singh*, I. L. R., 2 All., 809 and *Vishnu Krishnan*, I. L. R., 7 Mad., 3. The above principles are in accordance with those laid down in *Jorden v. Money*, 5 H. L. C. 185. See too Park's judgment in *Freeman v. Cook*, 2 Ex. 654 at p. 663. "If whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and

thus misled into honoring the cheque, the person responsible for the negligence could not recover from them the sum paid on it; *Young v. Grote*, 4 Bing., 253. The neglect must, however, be in the transaction itself and must be of some duty, which is owing to the person misled, or to the public of which he is a member, not merely of prudence as regards a man's own self, or of a duty owing to third parties. Thus where a person carelessly leaves his door open, whereby his goods are stolen, he is not estopped from denying the title of an innocent purchaser of the goods from the thief; *Swan v. N. B. Australasian Company*, 2 H. & C., 175, at p. 181.

In *Laverghie v. Hooper*, I. L. R., 4 Mad., 149, it was held that the plaintiffs, having by their conduct led defendants to believe that they claimed no right to a trade mark, and that it was open to the defendants to adopt it, were estopped from denying the defendants' right to use it in the Madras market.

In *Mina Konwari v. Juggat Setani*, I. L. R., 10 I. A. 119; I. L. R., 10 Cal., 196, the Judicial Committee held that to petition for postponement of a sale in execution of a decree is not a causing or permitting the decree-holder to suppose that the judgment-debtor admits that the decree can be legally executed. It creates no estoppel, and the judgment-debtor may, notwithstanding that he has filed such a petition, contend that execution is barred by lapse of time. For cases where such a petition has been held to be and not to be an estoppel; see *Girdhari Singh v. Hurdeo Nurain Singh*, I. L. R., 3 I. A. 230 and *Thakoor Mahatab Neo v. Leelanund Singh*, I. L. R., 7 Cal., 613, respectively.

In *Muhammad Sami-uddin Khan v. Mannu Lall*, I. L. R., 11 All., 386, the plaintiff in a suit for redemption of a mortgage was the assignee of the original mortgagor and in a former suit for redemption by the mortgagor had not applied to be made a party but had put forward or consented to putting forward the original mortgagor as the party entitled to redeem. It was held that as there was nothing in the litigation to show that the defendant mortgagee was in any way induced to alter his position or to do any act which he would not otherwise have done in consequence of the assignee's conduct, the latter was not estopped from afterwards suing for redemption on his own account. And a different case cannot be set up on appeal from what was set up in the Court below; so when E mortgaged land to the plaintiff, and the defendant bought the land at an execution sale for a debt of A. E's father to him, and on the trial the plaintiff set up E's title as against A's, on appeal he cannot claim any title against the creditor on the ground that the mortgage was good against A; *Bashi Chunder Sen v. Enayet Ali and another*, I. L. R., 20 Cal., 236.

Where occupancy tenants sold their rights with the consent of the zemindars it seems that the latter were not estopped from maintaining the sale deed to be invalid as against the vendee; although on their receiving rent from him a tenancy might have been created; *Burga v. Jhinguri*, I. L. R., 8 All., 511, 878.

This section which contemplates a person "by his declaration, act or omission causing or permitting another person to believe a thing to be true and to act on that belief," in which case he cannot "deny the truth of the thing," refers to the belief in a *fact* and not in a proposition of law; *Rajnurain Bose v. Universal Life Assurance Co.*, I. L. R., 7 Cal., 594; *Gashvant Puttu Shenvi v. Radhabai*, I. L. R., 14 Bom., 312. The causing another to believe need not be intentional; *Sarat Chunder Dey v. Gopal Chunder Laha*, I. L. R., 12 I. Ap., 203.

Estoppel by pleadings.—There is a form of estoppel which does not, perhaps, fall precisely within the terms of this section, but which is recognized by the Courts: *viz.*, that, where a litigant has set up one case, he will not, ordinarily, be allowed, at another stage of the suit, to abandon it and set up another—thus where a defendant, sued in ejectment, alleged that he had purchased the land, and disclaimed the plaintiff's title, he was not allowed in appeal to contend that he was an occupancy ryot; *Sutyabhama Dassee v. Krishna Chunder Chutterjee*, I. L. R., 6 Cal., 55. For a case where admissions of an understanding that a mortgage had been converted into a sale did not act as an estoppel to a denial of the existence of the mortgage, see *Abdul Rahim v. Madhavrav Apaji*, I. L. R., 14 Bom., 78.

116. No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immoveable property; and no person who came upon any immoveable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such license was given.

Estoppel of
tenant and
licensee.

Note.

Estoppel of Tenant.—The rule of English law that a tenant may not, while in possession, dispute the title of the landlord, under whom he entered, has been considered to involve the result that, if a

tenant consents to give up possession to a party claiming by a title adverse to his own landlord, the party is estopped, as the tenant would have been, from disputing the landlord's title; *Bullen v. Mills*, 2 B. & Ad., 17.

But a tenant may show that his landlord had no title at a date previous to the commencement of his tenancy: or that since the commencement of his tenancy, the title of the landlord has expired or been defeated: as by showing that his landlord's estate was for the lifetime of some person, who is since dead; or that he was a tenant at will, and that the tenancy has been concluded.—*Tayl.*, § 102.

Where a ryot, being in possession of a certain holding, executed a kabuliati, and paid rent for it to the plaintiff, who claimed it under a derivative title from the last owner, it was held that he was not estopped from disputing the plaintiff's title, as the words "at the beginning of the tenancy" must be held to apply only to cases where tenants are put into possession by the person to whom they have attorned, not to cases in which the tenant is already in possession; *Lal Mahomed v. Kellunus*, I. L. R., 11 Cal., 519.

So where the owner of certain land let another person into possession of some neighbouring waste land which was unassessed to the revenue; and the tenant let in a third person who got it assessed and obtained a patra for the land from the revenue authorities, it was held that the defendant (the third person) was not estopped from denying plaintiff's title, as after obtaining the patra his title was adverse; *Subbaraya v. Krishnappa*, I. L. R., 12 Mad., 422.

Where a defendant accepted a lease from the plaintiff alone it is no defence to an action for rent to say that he has paid it to the plaintiff's co-sharer wholly or jointly with the plaintiff; *Jamsedi Sorabji v. Lakshmiram Rajaram*, I. L. R., 13 Bom., 323.

Benami transactions are a recognized system among Hindus, the criterion of *bona fides* being the source whence the money came; *Gopeekrist Gosain v. Gungapersaud Gosain*, 6 Moore's I. A., 53. Therefore, in a suit for rent, based on a kabuliati, the tenant is not estopped from denying that the landlord, mentioned in the kabuliati, is the real landlord, and alleging that the title in the landlord, mentioned in the kabuliati, is only a benami or fictitious title. To assume that the landlord mentioned in the kabuliati is the real owner of the land is to beg the question; *Donzel v. Kedurnath Chuckerbutty*, 7 B. L. R., 720; 16 W. R., 186; 20 W. R., 352. This case was decided before this Act came into force, but the principle seems to be unaffected by this section.

The tenant cannot dispute his landlord's title; but in the case of a *benami* holder, whether landlord or tenant, "on one side or other of the contract, the name used is not that of the real contracting party . . . The principle of one of the common forms of *benami* contract in this country is that A contracts with B, though, by the desire and for the convenience of one or other of those parties, the name of C is used instead of the name of that party. It is clear that, in such a case, C did not contract at all. He was not the agent for either, but was, and is, a stranger to the whole business." *Per* Jackson, J., in *Dipinbehari Chowdry v. Ramchandra Roy*, 5 B. L. R., 234, at pages 243, 249.

Mere payment of rent does not estop the tenant, unless unexplained.—The mere payment of rent, however, does not necessarily estop the tenant from denying the landlord's title. "Where a tenancy is attempted to be established by mere payment of rent, without any proof of an actual demise or of the tenant having been let into possession by the person to whom the payment was made, evidence is always admissible on the part of the tenant to explain the payment of rent and to show on whose behalf such rent was received;" *Doe d. Harvey v. Francis*, 2 M. & Rob., 57. But in the absence of explanation, payment of rent would create an estoppel.

The estoppel continues during the continuance of the tenancy.—According to English law, the estoppel in cases of this class prevails, *while the tenant is in possession of the premises*: the present section extends it to the continuance of the tenancy.

117. No acceptor of a bill of exchange shall be permitted to deny that the drawer had authority to draw such bill or to endorse it⁽¹⁾; nor shall any bailee or licensee be permitted to deny that his bailor or licensor had, at the time when the bailment or license commenced, authority to make such bailment or grant such license.⁽²⁾

Estoppel of acceptor of bill of exchange, bailee or licensee.

Explanation (1).—The acceptor of a bill of exchange may deny that the bill was really drawn by the person by whom it purports to have been drawn.

Explanation (2).—If a bailee delivers the goods bailed to a person other than a bailor, he may prove

that such person had a right to them as against the bailor.

Note.

(1) **Of what the acceptance of a bill of exchange is deemed a conclusive admission.**—According to English law the acceptance of a bill of exchange is deemed a conclusive admission, on the part of the acceptor, of the signature of the drawer, and of his capacity to draw, and, if the bill be payable to the order of the drawer, of his capacity to indorse: and, if the bill be drawn by procuration, of the authority of the agent to draw in the name of the principal, and, observes Mr. Taylor, “it matters not in this respect whether the bill be drawn before or after acceptance.” But the acceptor does not necessarily admit the signature of the payee or any other indorser, though these indorsements may have been on the bill at the time of acceptance, nor that the agent, who has drawn a bill *per proc.*, payable to the order of the principal, had authority to indorse. Byles on Bills (15th ed.), 267. If the bill is accepted in blank, the acceptor may not deny the fact that the drawer indorsed it; *L. & S. W. Bank v. Wentworth*, L. R., 5 Ex. D., 96. When a forged bill is made payable to the order of the drawer, the acceptor may deny the genuineness of the indorsement.—*Tayl.* § 851. Under the present section the estoppel extends only to exclude a denial of the drawer's authority to draw or indorse; but the acceptor might, it would appear, be estopped from denying the genuineness of a drawer's signature, under Section 115, as against any person whom his acceptance had induced to accredit the bill. The acceptor of a bill is not estopped from denying the signature of the payee, or of an indorsee.

In England the acceptor, though he admits the authority of the drawer to draw the bill, does not admit his authority to indorse it; *Garland v. Jacob*, L. R., 8 Ex., 216, but if he accepts it with the intent that the drawer shall indorse it and raise money upon it, he may be estopped from denying the indorsement; *Beeman v. Duck*, 11 M. & W., 251.

If a partner consents to a bill being drawn in the firm's name, he may be taken to have conclusively established against himself that the indorsing was necessary for the purposes of the firm, and that his partner had the same authority as if the business of the firm required drawing and indorsing bills; *Lewis v. Reilly*, 1 Q. B., (N. S.), 349.

In Chapter XIII of the Negotiable Instruments Act, XXVI of 1881, certain special rules of evidence are laid down. Every negotiable instrument is presumed to have been drawn, accepted, indorsed,

negotiated or transferred for good consideration: to have been made on the date it bears: to have been accepted and transferred before maturity; to have been indorsed in the order in which the indorsements appear: if lost, to have been duly stamped. The Court must also presume that the holder is a holder in due course: and on proof of protest of a negotiable instrument, that it has been dishonoured. No maker of a bill of exchange, and no drawer of a bill of exchange or cheque, and no acceptor for honour can, as against a holder in due course, deny the validity of the instrument as originally drawn. No maker of a promissory note and no acceptor of a bill of exchange, payable to or to the order of a specified person, can, in a suit by a holder in due course, deny the payee's capacity, at the date of the instrument, to indorse it: and no indorsee may, in a suit by a subsequent holder, deny the signature or capacity to contract of any prior party to the instrument.

(2) **When bailee may plead badness of bailor's title.**—As to the general duties and rights of bailees, see Contract Act, 1872, Chapter IX, Sections 148—179. The law, as laid down in the present section, appears to be less stringent, as regards the estoppel of a bailee, than that of England, according to which a bailee, who has once acknowledged the title of the bailor, is precluded from setting up the title of a third party to the article bailed, except in cases where the bailor has obtained the article fraudulently or tortiously from the third person, and where the bailee is able to show that he was, when he acknowledged the bailor's title, ignorant of the fraudulent or tortious mode in which the article had been obtained, and also that the third party has made a claim to the article. A *pledgee* is, however, on a somewhat, different footing. "Where a person pledges property to which he has no title, the pledgee is not estopped from delivering it to the rightful owner; for, on an ordinary pledge, the pledgor impliedly undertakes that the property is his own; and the pledgee merely undertakes that he will return it to the pledgor provided it be not shown to belong to another. A common carrier, also, being bound to receive goods for carriage, and having no means of making enquiry as to their ownership, is at liberty to dispute the title of the person from whom he has received them; and may establish a defence by proving that he has delivered them to the real owner on his claiming them." *Tayl.*, § 849.

Under the present section, a bailee sued by his bailor, would, it appears, in every instance be able to plead that the bailor's title was bad, and that he had delivered the article bailed to the rightful owner.

By 18 & 19 Vic. c. III, s. 3, it is provided that a bill of lading in the hands of the consignee or indorsee for valuable consideration,

representing goods to have been shipped on board a vessel, is conclusive proof of that shipment as against the master or other person signing the same; unless the holder of the bill of lading had actual notice that the goods were not on board. But the master or other person signing the bill of lading may exonerate himself by showing that the misrepresentation was caused without any default on his part and wholly by the fraud of the shipper or holder or some one under whom the holder holds. *Steph. Dig., Art. 105.*

CHAPTER IX.

OF WITNESSES.

Who may
testify.

118. All persons⁽¹⁾ shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.

Explanation.—A lunatic is not incompetent to testify unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

Note.

Competence of witnesses.—This general provision must be read subject to the special disqualifications provided elsewhere in the Act, as, for example, in Sections 122, 123, 126. Nor is it to be understood as enabling an accused person to give evidence as a witness on his own behalf, inasmuch as the Code of Criminal Procedure expressly provides that no oath or affirmation shall be administered to the accused person.

The only disqualification is the presence of some cause, which prevents the witness from understanding the questions put to him or giving rational answers. The English law adds “or from knowing that he ought to speak the truth.” This omission in the Indian Act will obviate the occurrence of questions as to the condition of witnesses, whose age, appearance or circumstances suggest the probability of a want of moral perception. The only question for the

Judge is whether the witness can understand the question and give rational answers. There is no definition of the word "testify" in the Act; but it is obvious that it refers to the "statements which the Court permits or requires to be made before it by witnesses" mentioned in Section 3.

Act X of 1873 provides that Hindus and Mahomedans and all persons who have an objection to an oath, shall make an affirmation instead of an oath. The Act further provides that a witness may offer to give evidence on oath in any form common amongst or held binding by persons of his race or persuasion, not repugnant to justice or decency, and not purporting to affect any third person, and that the Court may, if it think fit, tender such oath: and further, that, a party may offer to be bound by evidence given on any such oath, if taken by the opposite party: and that if in such a case the opposite party chooses to take it, the evidence so given, shall be conclusive proof as against the person who offered to be bound.

In *R. v. Mussamut Itwarya*, 14 B. L. R., 54, the accused was charged with throwing two children into a well. The only eye-witness of the offence, at the trial before the Sessions Judge, was a child, and as she did not understand the nature of an oath or solemn affirmation, her evidence was taken on simple affirmation. The jury found the prisoner guilty: On appeal the Bengal High Court held, that the omission to administer either an oath or solemn affirmation, although knowingly made, did not, with reference to the Indian Oaths Act, render the child's evidence inadmissible.

In *Queen-Empress v. Maru*, I. L. R., 10 All., 207, it was held that the evidence of a child of tender years without an oath or solemn affirmation was not admissible because §§ 6 & 18 of the Oaths Act X of 1873 are imperative, but this decision was dissented from in *R. v. Shava*, I. L. R., 16 Bom., 359.

An oath or affirmation must not be administered to a witness unless the witness's competency is proved. For this purpose the Court should examine the extent of his intellectual capacity and understanding; *Queen-Empress v. Lal Lohai*, I. L. R., 11 All., 188.

Attendance of witnesses.—There are various penalties, by which witnesses are compelled to accept service of summons, to come to Court, to speak the truth, and to produce documents when legally called upon to do so. As to civil cases, see Civ. Proc. Code, 1882, Ch. XIV; and in criminal proceedings, Crim. Proc. Code, Ch. XVIII; also Indian Penal Code, Chapter X, Sections 172—180, but note that Section 178 is practically repealed by the Oaths Act, 1873. In addition to these penal provisions, a party, aggrieved by the refusal of a witness to attend or to speak or to produce a document, has a civil

remedy. By Section 26 of Act XIX of 1853, any person to whom a summons to attend and give evidence, or produce a document, is personally delivered, and who, without lawful excuse, neglects or refuses so to attend, or who absconds in order to avoid service of the summons, and any person who, when required by the Court to give evidence or to produce a document, refuses to give evidence, or sign his deposition, or produce a document in his possession, is liable to the party, at whose instance the summons was issued or the evidence required, for all damages, arising from such neglect, refusal or absconding, to be recovered in a Civil action. Section 178 of the Civ. Proc. Code declares that "Whenever any party to a suit is required to give evidence, or to produce a document, the rules as to witnesses contained in this Code shall apply to him as far as they are applicable."

2. **Evidence of the Accused.**—Though it is not expressly provided by the Act, it must be inferred from the language of the Criminal Procedure Code that an accused person is not a competent witness in his own trial; as Section 345 provides distinctly against the administration of an oath or affirmation to an accused person. In England the Criminal Evidence Act 1898 (61 & 62 Vict. c. 36) makes a person charged with an offence and his wife or her husband a competent witness for the defence at every stage of the proceedings; the person charged may not be called except on his own application, and except in a few cases the wife or husband may not be called without the consent of the person charged, the most important exceptions being where the one commits an offence such as an assault on the other. The principle of the Act had obtained recognition in previous legislative enactments, of which much the most important was the Criminal Law Amendment Act 1885, which dealt with offences against women and children: and the Act was strongly opposed by a certain number of lawyers who had had practical experience in the working of this measure. Their contention was that it would lead to the conviction of innocent persons by leading the jury to substitute the balance of evidence for the absence of reasonable doubt as a ground for conviction, and by offering an innocent prisoner of bad character an opportunity of trying to improve his position by telling a lie. The Act has not yet been sufficiently tested to make it possible to say how far these views have been justified.

One accused cannot be a witness for or against a co-accused.—The statement of one of several jointly accused persons, implicating himself and some other of the accused, may be considered by the Court against all the co-accused (*ante* Section 30): from this it may be inferred that one of several co-accused persons cannot except where a pardon has been tendered under the Code, be called as a witness for or against the co-accused, a course of procedure which the

English law formerly did not allow; *R. v. Payne*, L. R., 1 C. C. 349 R, but which has been followed by the Indian Courts; *R. v. Ashraf Sheikh and others*, 6 W. R. Criminal Rulings, 91. When a charge was made against two persons, but process issued against one only, the other was held to be a competent witness for the defence; *Mohesh Chundra Kopali v. Mohesh Chundra Das*, 10 Cal., L. R., 553. Where a man was arrested and illegally discharged it was held that he might be a competent witness against his accomplices; an accused person under Section 342 of the Code of Criminal Procedure means one over whom the magistrate or other Court is exercising jurisdiction; *R. v. Mona Puna*, I. L. R., 16 Bom., 661.

As to Jurymen or Assessors becoming witnesses, see Criminal Procedure Code, Section 294.

In England it has been questioned whether a prisoner under sentence of death is a competent witness; *R. v. Webb*, 11 Cox, 133, *Steph Dig.*, § 107.

119. A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.

Dumb witnesses.

Note.

Deaf and dumb witnesses.—The same rule would, no doubt, be applicable in the case of deaf, or deaf and dumb witnesses, who might be communicated with by special signs, provided the Court was satisfied as to the reality and accuracy of such communication. Competence to understand the questions put to him and to give rational answers is, under Section 118 the one essential qualification for a witness. Deaf and dumb persons were formerly excluded as witnesses on the presumption of their idiocy: it is now ascertained how groundless this presumption is.

120. In all civil proceedings the parties to the suit, and the husband or wife of any party to the suit shall be competent witnesses.⁽¹⁾ In criminal proceedings against any person, the husband or wife of such person, respectively, shall be a competent witness.

Married persons in Civil and Criminal proceedings.

Note.

Civil Proceedings.—Bastardy proceedings under the provisions of s. 488 of the Crim. Proc. Code are in the nature of civil proceedings within the meaning of this section and the person sought to be charged is a competent witness on his own behalf; *Nur Mahomed v. Bismulla Jan*, I. L. R., 16 Cal., 781.

Competence of parties and of husband or wife of a party.—By the English Common Law the parties to a proceeding and the husband or wife of a party were formerly incompetent as witnesses in all cases. This incompetency was removed as to parties in civil cases, but not in criminal, by 14 & 15 Vic. c. 99, s. 2: and as to husbands and wives by 16 & 17 Vic. c. 83, Sections 1 & 2, except in proceedings for adultery. This exception was repealed by 32 & 33 Vic. c. 68, Section 3, with the proviso that no witness, whether a party to the suit or not, is liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already, in the same proceeding, given evidence in disproof of adultery. A wife or husband of a person charged with a criminal offence is now a competent witness for the defence, and sometimes a compellable one for the prosecution; see 61 & 62 Vict. c. 36, *supra*, p. 348.

Indian Divorce Act.—In India there was, previous to the passing of the Evidence Act, a conflict of opinion between the Indian Courts as to the admissibility of evidence of this description. By Section 51 of Act IV of 1869, it is provided that any party may offer himself or herself as a witness and shall be examined and may be cross-examined like any other witness. Provision is also made for the parties verifying their cases by affidavit, and for the cross-examination of the party making the affidavit. Section 52 provides that, in petitions presented by a wife praying for dissolution of marriage on the ground of adultery coupled with cruelty, or coupled with desertion without reasonable cause, the husband and wife respectively shall be competent *and compellable* to give evidence of, or relating to, such cruelty or desertion. The effect of these provisions appears to be to restrict the competency of husbands and wives, in the first class of cases, to suits in which the parties offer themselves as witnesses or verify these cases by affidavit: and in the second to confine the evidence to the question of cruelty and desertion; *Kelly v. Kelly and Saunders*, 3 B. L. R., Appx., 6. These provisions, which are borrowed from the English Act, 22 & 23 Vic. c. 61, s. 6, imply that, except as provided, husbands and wives were not at the time of the passing of the Act, compellable in Matrimonial suits to which they were parties, to give evidence. The present section lays down a general rule of competence as between

husband and wife, in civil and in criminal proceedings, but does not refer expressly to Matrimonial proceedings. If it be held that the section does not extend to these, the result will be (1) that husbands and wives can offer themselves to give evidence in any case, or may tender affidavits, and will thereupon be liable to cross-examination and re-examination and (2) that, in petitions by a wife praying for dissolution of marriage on the ground of adultery coupled with cruelty, or coupled with unreasonable desertion, the husband is competent and compellable to give evidence of such cruelty or desertion, but not, apparently, of the adultery. There is no express provision in the Indian Act importing the proviso mentioned in 32 & 33 Vict. c. 68, s. 3 into Indian Law.

Communications during marriage.—The provisions of the present section are considerably restricted by those of Section 122, which exclude all communications made during marriage.

The rule as to the competence of husband or wife as a witness in criminal cases is a re-enactment of the law in force in this country, as laid down by Peacock, C. J., in *R. v. Khairula*, 6 W. R., Criminal Rulings, 22. The Judgment in this case contains a lucid exposition of the grounds on which it is considered advisable in India to make such evidence admissible.

In *De Bretton v. De Bretton and Holme*, I. L. R., 4 All., 49, the respondent was summoned by the petitioner and asked on examination whether he had had sexual intercourse with the respondent. He answered this question, not being aware that he was at liberty to decline to answer. It was held that he had not 'offered himself' as a witness, and that his answer to this question was not admissible.

121. No Judge or Magistrate shall, except upon the special order of some Court to which he is subordinate, be compelled to answer any questions as to his own conduct in Court as such Judge or Magistrate, or as to anything which came to his knowledge in Court as such Judge or Magistrate; but he may be examined as to other matters which occurred in his presence whilst he was so acting.

Judges and
Magistrates.

Illustrations.

(a) A, on his trial before the Court of Session, says that a deposition was improperly taken by B, the Magistrate. B

cannot be compelled to answer questions as to this, except upon the special order of a Superior Court.

(b) A is accused before the Court of Session of having given false evidence before B, a Magistrate. B cannot be asked what A said, except upon the special order of the Superior Court.

(c) A is accused before the Court of Session of attempting to murder a Police officer whilst on his trial before B, a Sessions Judge. B may be examined as to what occurred.

Note.

Privilege of Judges and Magistrates.—This section clears up an uncertain point of English law by exempting a Judge from answering questions as to his own conduct in Court, or as to anything other than actual occurrences in his presence, which came to his knowledge in Court as such Judge, unless with the special order of the Court above. See *Steph. Dig. Art.* 111.

When a Judge may be a witness.—A Judge may, if it be necessary, give evidence in a case which he is himself trying, but should first make the proper oath or affirmation, *Best*, § 188. A Sessions Judge has been held, in this country, competent to give evidence in a case tried before him with the aid of assessors; *R. v. Mukta Singh*, 4 B. L. R., (Cr. Ap.) 15. Mr. Taylor suggests, § 1379, that a Judge, sitting alone, cannot be a witness as there is no one to tender the oath to him; and in *I. v. Donnelly*, 2 I. L. R., Cal., 405, it was held that one, who is sitting as a sole Judge, is *not* competent also to be a witness. Markby, J., observed (page 412). “As to the second point, whether the conviction is illegal because the Magistrate himself gave evidence, that question seems to me to resolve itself into this. Is a sole Judge of law and fact competent to decide a case in which he has himself given evidence? It has been strongly contended on the part of the Crown that he is so, and that there is no impediment in law to a Judge giving evidence, and then disposing himself of the case by his sole opinion. No instance of this kind has, however, been found, and no authority of any Judge or text writer has been cited in support of such a proposition. The English cases (they are very few and very old) do not go further than to establish that a person having to exercise judicial functions may give evidence in a case pending before him when such evidence can and must be submitted to the independent judgment of other persons, exercising similar judicial functions, sitting with him at the same time (*per* Norman, J., in *L. v. Mukta Singh*). No case in England is cited in which even under the

circumstances, a Judge has been called as a witness in a trial, on which he was sitting, later than the trial of Lord Stafford. Two cases are cited as having occurred in this country—one the case of *R. v. Tarapersaud Bhattacharjee*, and the other the case before Mr. Justice Norman above referred to. That learned Judge went into the matter on that occasion very fully; and having carefully considered his judgment, I have come to the conclusion that he did not intend to carry the law beyond that which he lays down as the result of the English cases . . . In the absence therefore of any authority for the position that a sole Judge of law and fact may give evidence, and then decide a case in which he has been a witness. I refuse to give any countenance to what appears to me to be a most objectionable proceeding. Every one admits that it is highly objectionable for a Judge to give evidence even when there are other Judges beside himself. For my own part, I consider these objections so formidable that I would gladly see the practice of calling a Judge as a witness abolished in all cases. But these objections are greatly increased when the Judge who testifies is a sole Judge. The case is entirely in his hands. He has no one to restrain, correct, or check him. If he gives evidence upon any matter of importance, the party against whom his evidence tells could not venture to test his credibility either by cross-examination, or contradict it by other testimony . . . The Judge would therefore give his evidence without the usual safeguards against false testimony—a position which has been over and over again repudiated.”

There is great weight, no doubt, in the objections urged against the functions of Judge and witness being united in a single person. The fact, however, remains that the Judge, who tries a case, must sometimes know facts which have a material bearing upon it. He must not, without giving evidence, import into the case his knowledge of these facts; *Haro Persad v. Sheo Dyal*, L. R., 3 I. A., 280. Yet it is very improbable that he will be able to divest his mind of it so as to prevent its influencing his decision. It might therefore seem better that he should openly produce it and give the parties the opportunity of testing its accuracy by cross-examination and the Court of Appeal the opportunity of testing its cogency. Where a Judge, sitting with others, has given evidence the proper course, says Mr. Taylor, “appears to be that he should leave the Bench and take no further judicial part in the trial, because he can hardly be deemed capable of impartially deciding on the admissibility of his own testimony, or of weighing it against that of another.”—*Tayl.*, § 1379.

In England “it seems that a barrister cannot be compelled to testify in Court as to what he said in Court in his character of a barrister;” *Curry v. Walter*. 1 Esp., 456. *Steph. Dig.*, § 111.

Communica-
tions during
marriage.

122. No person who is or has been married, shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication, unless the person who made it, or his representative in interest, consents, except in suits between married persons, or proceedings in which one married person is prosecuted for any crime committed against the other.

Note.

Communications made during Marriage.—Though by Section 120, husbands and wives are made competent witnesses against one another, they are still to some extent privileged. No witness *need* disclose a communication made to him or her by wife or husband during marriage: nor, without the permission of the wife or husband, *can* a witness disclose any such communication except in the two classes of cases specified. The privilege extends to communications made during marriage although the marriage has been dissolved, but not to communications made before marriage, although the marriage is still existing when the evidence is tendered.—*Tayl.*, §§ 909, 910, 910 A.

The exception in the case of a prosecution of one married person for an offence against the other is grounded on the common law English rule which in such cases always made the husband or wife a competent witness.—*Tayl.*, § 1371.

Evidence as
to affairs of
State.

123. No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.

Note.

"Affairs of State" would, no doubt, be held to include any matters of a public nature with which the Government is concerned. 21, Geo. III c. 70, s. 5 provides for complaints to the Supreme Court against the Governor-General or members of Council and enables the Court, in such cases, to enforce the production of a copy of the order and the examination of the person complained of.

124. No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure.

Official communications.

Note.

Statements by an officer before a Military Court of Inquiry.—Statements, whether oral or written, made by an officer summoned to attend before a Military Court of Inquiry are part of the minutes of the proceedings of the Court, which, when reported and delivered to the Commander-in-Chief, are received and held by him on behalf of the Sovereign, and, on grounds of public policy, cannot be produced in evidence; *Dawkins v. Lord Rokeby*, L. R., 8 Q. B., 255.

125. No Magistrate or Police Officer shall be compelled to say whence he got any information as to the commission of any offence, and no revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue.

Information as to commission of offences.

Explanation.—‘Revenue officer’ in this section means any officer employed in or about the business of any branch of the public revenue.—*Act III of 1887.*

Note.

The privilege thus conferred on Magistrates and Police officers and Revenue officers is extended to the Commandant and second in command of the Bengal Military Police by Act V of 1892, s. 12.

126. No barrister, attorney, pleader or vakil, shall, at any time, be permitted, unless with his client’s express consent, to disclose any communication made to him in the course and for the purpose of his employment as such barrister, pleader, attorney or vakil by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the

Professional communication.

purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.⁽¹⁾

Provided that nothing in this section shall protect from disclosure—

(1) Any such communication made in furtherance of any illegal purpose;⁽²⁾—[*Act XVIII of 1872, s. 10.*]

(2) Any fact observed by any barrister, pleader, attorney or vakil, in the course of his employment as such, showing that any crime or fraud has been committed since the commencement of his employment.

It is immaterial whether the attention of such barrister, pleader, attorney or vakil was or was not directed to such fact by or on behalf of his client.⁽³⁾ —[*Act XVIII of 1872, s. 10.*]

Explanation.—The obligation stated in this section continues after the employment has ceased.

Illustrations.

(a) A, a client, says to B, an attorney,—‘I have committed forgery, and I wish you to defend me.’

As the defence of a man known to be guilty is not a criminal purpose, this communication is protected from disclosure.

(b) A, a client, says to B, an attorney,—‘I wish to obtain possession of property by the use of a forged deed on which I request you to sue.’

This communication, being made in furtherance of a criminal purpose, is not protected from disclosure.

(c) A, being charged with embezzlement, retains, B, an attorney, to defend him. In the course of the proceedings, B

observes that an entry has been made in A's account book, charging A with the sum said to have been embezzled, which entry was not in the book at the commencement of his employment.

This being a fact observed by B in the course of his employment, showing that a fraud has been committed since the commencement of the proceedings, it is not protected from disclosure.

Note.

(1) **Professional Communications.**—The communication, in order to be privileged, must have been in the course and for the purpose of the barrister's or other professional person's employment. Observations, therefore, which, though made during such employment, were not for the purpose of the employment, would not be privileged. Accordingly, a remark by a prosecutor that "he would give a large sum to have the prisoner hanged," or a remark by a party after the completion of a compromise that "he was glad that he had settled it"—would, it seems, be without the scope of the section.

And where confidential communications were made to a lawyer, but, from some accidental cause, he was not employed, the communication has been held not to be privileged: the same would be the case with communications made to a professional person previous to his employment, and, of course, with communications made to a man under an erroneous notion that he was an attorney.

It is not, however, necessary that there should have been "any regular retainer, or any particular form of application or engagement, or the payment of any fees; it is enough if the legal adviser be, in any way, consulted in his professional character."—*Tayl.*, § 928. A communication to be privileged must in all cases be confidential. On a claim to privilege being made by a solicitor under this section he is bound to disclose his client's name; and this is so although it may have been disclosed to him in the course of his employment by another client, unless such communication was confidential that is on the express understanding that it was not to be revealed; the solicitor is not bound to disclose the nature of his employment, but see Note (2), *F'ranjé Bhicaji v. Mohansing Dhansing*, I. L. R., 18 Bom., 268.

It is quite immaterial whether the communication be made with reference to any pending or contemplated litigation. If it be with reference to the matters which fall within the ordinary scope of professional employment, the legal adviser cannot disclose it.—*Tayl.*, § 913; *Greenough v. Gaskell*, 1 M. & K., 98, at p. 108.

Mere matters of observation, unconnected with professional advice, are not protected. Thus, an attorney may be asked as to his client's handwriting, even though his knowledge of it was gained in the course of his professional employment, or as to his identity, these being matters of independent observation.

The rule, laid down in the section, applies, according to the English cases, even though the attorney be a co-defendant; *Hamilton v. Nott*, L. R., 16 Eq., 112; but, except as thus restricted, an attorney is a competent witness either for or against his client.—*Best*, § 184.

When two parties employ a common solicitor.—In this case the protection extends only to such communications as are made by each to the solicitor in the character of his own solicitor, not to those made to him as solicitor for the other party: *e.g.*, A and B employ C as common solicitor to transact a sale. A, the purchaser, asks C to get the payment of the purchase-money postponed; this communication is not protected, because it was made to C, not in his capacity of A's own solicitor, but of B's; *Perry v. Smith*, 9 M. & W., 681.

An admission made by a defendant, in the presence of the plaintiff, to a person who was acting as attorney for both, was held not to be protected under Section 126, inasmuch as (1) being made in presence of the plaintiff, it could not be regarded as confidential; and, secondly, because it was not made exclusively to the attorney of the defendant but also to the attorney of the plaintiff; *Memon Haji v. Moloi Abdul Kavin*, I. L. R., 3 Bom., 91.

No hostile inference should be drawn from a refusal to let a legal adviser disclose confidential communications.—In *Wentworth v. Lloyd*, 10 Jur., N. S., 961, Lord Chelmsford distinguished such cases from those in which evidence is improperly kept out of the way, and in which, accordingly, the presumption is against the wrongdoer; and quoted with approbation the following remarks of Lord Brougham in *Bolton v. The Corporation of Liverpool*, 1 My. & K., 94. "If such communications were not protected, no man would dare to consult a professional adviser with a view to his defence or to the enforcement of his rights, and no man could safely come into a Court, either to obtain redress or to defend himself. The exclusion of such evidence is for the general interest of the community; and, therefore, to say that, when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection, which, for public purposes, the law affords him, and utterly to take away a privilege, which can thus only be asserted to his prejudice?"

(2) **Communication made in furtherance of an illegal purpose.**—So, where a party, having possessed himself of the title-deeds of a deceased

person, placed a forged will of the deceased amongst them, and then sent the whole to his attorney, ostensibly for the purpose of asking his advice upon them, but really, as it seemed, that the attorney might find the will and act upon it, the English Judges unanimously held that the attorney was bound to produce the will on the trial of his client for forgery. Under the present Act such a communication would fall within proviso (1). The proviso is no real exception to the rule, because, as was pointed out in *Follett v. Jeffreys*, 3 Sim., N. S., 17, it is no part of the professional business of any class of lawyer to further the commission of a fraud.

In England it appears that the legal adviser could not be asked whether the communication between him and his client was for an illegal purpose, but that it must be shown by independent evidence that there was a criminal intention.—*Tayl*, § 912; but in *R. v. Cor and Railton*, C. C. R., 14 Q. B. D., 153, ten Judges considered the point and upheld a conviction in which evidence of a conversation between a client and attorney, in itself indicative of an intention to commit a fraud, was admitted, though there was no independent evidence of a fraudulent intention. The question whether this proviso applies so as to deprive a solicitor of his privilege must be decided by the Court in each case upon the evidence whenever it seems probable that the client consulted the solicitor for an illegal purpose; *Framji Bhicaji v. Mohansing Dhansing*, I. L. R., 18 Bom., 263 at p. 276. Sections 182 and 165 make it clear that under the present Act such a question may be put.

(3) **Privilege is strictly confined to professional communications.**—The protection afforded by this section and Section 129 will be limited strictly to professional communications. "It may be laid down generally, in the language of Lord Cranworth, 'that there is no protection as to letters between parties themselves, or from a stranger to a party, merely because such letters may have been written in order to enable the person, to whom they were addressed, to communicate them in professional confidence to his solicitor.'"—*Tayl*., § 921.

And, if a solicitor, by the direction of his client, makes a proposal to the opposite party, he may be compelled to disclose what he stated to that party, though he cannot divulge what his client had communicated to him."—*Tayl*., § 922.

So also an attorney can be compelled to discover to whom he parted with his client's title-deeds, and in whose possession they are. So, for the purpose of letting in secondary evidence of the contents of a document, an attorney will be bound to answer whether it is in his possession, or elsewhere in Court, even though he may have obtained it from his client in the course of communication with reference to

the cause. And, if an attorney attests an instrument, which his client executes, he may be compelled to prove the execution.

It is to be noted that neither this section nor Section 131 have the effect of *prohibiting* a barrister or other professional person from producing a document entrusted to his charge by a client, though Section 131 justifies his refusal to do so. The production of such a document would, however, be so wholly at variance with the spirit of Sections 126, 130 and 131, that it would, probably, not be allowed by the Court unless with the client's consent.

Communications made to priests or doctors.—There is no reference in the Evidence Act to confidential communications with priests, clergymen and doctors; and it is doubtful whether, in such cases, the Court could, under Section 23, *infer* an agreement between the parties that evidence should not be given. The question as to the obligation of priests to disclose confessions made to them professionally has never, Sir J. Stephen says, been solemnly decided in England; the argument in favor of such confessions being protected is that the privilege must have existed at the time when the Roman Catholic Religion was established by law and has never been taken away. Sir J. Stephen, however, considers, that the English Law of Evidence has grown up subsequent to the reformation, and at a time when little favor was likely to be shown to auricular confession. Several English Judges have considered that evidence of such confessions ought not to be given. *Steph. Dig.* Note XLIV.

Section 126
to apply to in-
terpreters, &c.

127. The provisions of Section 126 shall apply to interpreters, and the clerks or servants of barristers, pleaders, attorneys and vakils.

Note.

Privilege extends to interpreters and lawyers' clerks.—The provisions of Section 126 do not extend to agents, other than of the classes referred to in the section, sent out by a party to collect information for the purposes of the suit, although the intention, may have been to put the information so collected before a solicitor. "There is no protection," said Lord Cranworth, "as to letters passing between parties themselves, or from a stranger to a party, merely because such letters may have been written, in order to enable the person to whom they are sent to communicate them, in professional confidence, to his solicitor;" *Goodall v. Little*, 1 Sim. N. S. 155.

Under the present section the test would be whether the person in question was the clerk or servant of a barrister, pleader, attorney

or vakil, or the clerk or servant of the party: in the latter case the section would not extend to him.

The protection was held, under the corresponding provision of Act II of 1855 not to extend to Mooktyars; *R. v. Chandrakunt*, 1 B. L. R., A. C., 8.

128. If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in Section 126; and if any party to a suit or proceeding calls any such barrister, pleader, attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, pleader, attorney, or vakil on matters which, but for such question, he would not be at liberty to disclose.

Privilege not waived by volunteering evidence.

Note.

Privilege not waived by party volunteering evidence.—By the old law, a party, who gave evidence in a suit at his own instance, was deemed to have waived his privilege, and to have consented to disclosure by his professional adviser of any relevant matter, which the professional adviser would, but for such privilege, be bound to disclose. Under the present Act the mere fact of the party's giving evidence himself does not imply such consent: and if he calls the barrister, &c., as a witness and questions him, he is deemed to consent to disclosure by the barrister, &c., only if he questions him on matters which, but for such question, he would be bound not to disclose: and by giving evidence he does not expose himself to be questioned about professional communications except so far as is necessary to explain his evidence.

The word "Pleader" was added by Act XVIII of 1872.

129. No one shall be compelled to disclose to the Court any confidential communication which has taken place between him and his legal professional adviser, unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the Court

Confidential communication with legal advisers

necessary to be known in order to explain any evidence which he has given, but no others.

Note.

Confidential communications when privileged.—Under the old law, Act II of 1855, Section 22, a party to a suit, who offered himself as witness, was bound to produce any confidential writing or correspondence that had passed between himself and his legal professional adviser. The reason for this rule is not very apparent; and the present section abrogates it so far that such correspondence need be produced only if it is necessary to explain the witness' evidence.

It will be observed that the doubts which were at one time felt in the English Courts as to whether the protection extends to communications made by a client to his solicitor before any dispute has arisen, cannot arise under this section.—*Tagli.*, § 924. The English Law at present is now identical with the rule here laid down; *Vinet v. Morgan*, L. R., 8 Ch. App., 361.

Section 126 to 129 refer to communications between clients and their legal advisers alone. There are cases, however, in which information and opinions are obtained with a view to litigation, for which no provision appears to be made in the Act. In such cases a distinction is made by the English Courts between reports made in the course and as part of the duty of an agent or servant, and those made confidentially and for the purpose of litigation alone. In *Woolley v. North London Ry. Co.*, L. R., 4 C. P., 602, the subject of inspection of reports or documents, furnished by agents or servants, was fully considered, and the Court of Common Pleas held that, where such reports are made confidentially and for the purpose of litigation they are privileged. Brett, J., laid down the following rules, (pages 618, 614,) "Any report or communication by an agent or servant to his master or principal, which is made for the purpose of assisting him to establish his claim or defence in an existing litigation, is privileged, and will not be ordered to be produced: but, if the report or communication is made in the ordinary course of the duty of the agent or servant, whether before or after the commencement of the litigation, it is not privileged, and must be produced. The time at which the communication is made is not the material matter, nor whether it is confidential, nor whether it contains facts or opinions. The question is whether it is made in the ordinary course of the duty of the servant or agent, or for the instruction of the master or principal as to whether he should maintain or resist litigation." See also *Cossey v. London and Brighton, &c., Ry. Co.*, L. R., 5 C. P., 146, followed in *Skinner v. The Great-Northern Ry. Co.*, L. R., 9 Ex.,

298; *Mahony v. Widow's Life Assurance Fund*, L. R., 6 C. P., 252; and *M'Corquodale v. Bell*, L. R., 1 C. P. D., 471; *Baber v. London and South Western Ry. Co.*, L. R., 3 Q. B., 91; *Wheeler v. Le Marchant*, 17 Ch. D. 675; and *Gulcraft v. Gucst*, [1898] 1 Q. B., 759. In *Chartered Bank of India v. Rich*, 4 B. & S., 73; 32 L. J. (Q. B.), 300, Cockburn, C. J., said "If a man writes a private letter to an agent or friend asking him to obtain information for him on a matter as to which he is about to engage or has engaged in litigation, I doubt whether a discovery or inspection of the answer to that letter would be ordered by any of the learned Judges in equity to whose decisions reference has been made: and I will not be a party to establishing such a precedent." In *Ross v. Gibbs*, L. R., 8 Eq., 522, 524; 39 L. J. (Ch.) 63, Stuart, V. C., pointed out that "the privilege which exempts a communication from production is the privilege of the client, and not of the solicitor; and communications, relating to the subject-matter of the suit, and furnished with a view to litigation, are as much protected upon principle when made by a lay agent to a litigant as they are when made by a solicitor. I account for the frequent reference to the solicitor in the authorities, by his being treated as the person who conducts the litigation; but in reality, it is the plaintiff who conducts the litigation, though he conducts it through his solicitor."

In *Fenner v. London and S. E. Railway Company*, L. R., 7 Q. B., 767, Lord Blackburn laid down the rule that communications made with a person, who, though not the solicitor, might be regarded as the solicitors' deputy were privileged. "The principle, I think, to be derived from all the cases is that, where it appears that the documents are substantially rough notes for the case to be laid before the legal adviser, or to supply the proof to be inserted in the brief, the discretion of the Court should, as a general rule, be to refuse the inspection." The Court of Exchequer, however, in *Skinner v. The Great Northern Railway Company* declined to be guided by the rule laid down by the Queen's Bench in *Fenner v. London and S. E. R.*, and preferred the view taken in *Cossey v. London and Brighton Company*, L. R., 5 C. P., 146, when the Judges held that documents, procured for the purpose of assisting a party in impending litigation, are privileged from production, and relied upon the language of Stuart, V. C. in *Ross v. Gibbs*. The point may now be considered as governed by the decision in *Bustros v. White*, L. R., 1 Q. B. D., 423. In that case it was held that correspondence between the plaintiff and his agent and another firm, which the defendant claimed to see as "material to his defence," was not privileged, inasmuch as it did not come within the rule of privilege applying to professional confidence, which only applied to inquiries instituted by or under the

direction of professional advisers. Jessel. M. R., observed that, in order to be privileged, the communication, if it does not come from the solicitor direct, must be information sent at his instance by an agent employed by him or by the client on his recommendation.

The Civil Procedure Code, 1882, Section 133, allows a party to apply for inspection of documents, and Section 134 requires such an application, except in the case of documents referred to in the plaint, written statement or affidavit of the other party or disclosed in his affidavit of documents, to be grounded on showing (1) of what documents inspection is sought, (2) that the party applying is entitled to inspect them, and (3) that they are in the possession or power of the party against whom the application is made. The term "to the production of which he is entitled" is used in Section 50 of the Common Law Procedure Act, 1854, and Montague Smith, J., pointed out in *Woolley v. North London Ry. Co.*, L. R., 4 C. P., 602, at p. 612, "the words are, to the production of which he is entitled; that must mean entitled in equity." A communication between master and servant or principal and agent, coming within the limitations mentioned in the above cases, is, therefore, privileged. If it be in writing and that writing be referred to in the plaint, written statement or affidavit of a party to the suit, Section 134 of the Civil Procedure Code will apply. In all other cases the party applying for an inspection must prove that he is entitled thereto and the Court will have to consider whether the communication is privileged or not. It must be remembered that many such communications may fall within the protection afforded by Section 23.

In *Munchessaw Bezori v. The New Dhurumsey Spinning and Weaving Company*, I. L. R., 4 Bom., 580, it was urged that though a client could not, under this section, be compelled to *disclose to the Court* a case, submitted by him to his counsel for opinion, yet that the other party was entitled to demand inspection of it under Section 130 of the Civ. Proc. Code, 1882: West, J., however, held that this could not be done, and in his judgment traced the course of English decisions on privileged communications.

Production
of witness'
title-deeds.

130. No witness who is not a party to a suit shall be compelled to produce his title-deeds to any property, or any document in virtue of which he holds any property as pledgee or mortgagee, or any document the production of which might tend to criminate him, unless he has agreed in writing to produce them with the person seeking the

production of such deeds or some person through whom he claims.

Note.

Witness not generally compellable to produce his title-deeds.—The rule laid down in this section as to the production of documents corresponds with the English Law: Best, § 216. That laid down in Section 132, with regard to answering questions, as will be seen under that section, differs. The English rule as to documents is, however, more extensive than the Indian, inasmuch as it exempts a witness from producing a document which might subject him to penalty or forfeiture, which this section apparently does not. But neither according to English nor Indian law will the mere fact that the production of the document may render the witness liable to a civil action justify a refusal to produce a document; *Doe d Rowcliffe v. Lord Egremont*, 2 M. & Rob., 386.

Unless he is party to the suit.—Witnesses who are parties to the suit do not fall within the protection afforded by this section.

Where a witness is not compellable to produce his title-deeds he cannot be compelled to answer questions as to their contents.—This is the rule of English law. "It would be perfectly illusory," observed Alderson, B., "for the law to say that a party is justified in not producing a deed, but that he is compellable to give parol evidence of its contents; that would give him, or rather his client through him, merely an illusory protection, if he happens to know the contents of the deed, and would be only a roundabout way of getting from every man an opportunity of knowing the defects there may be in the deeds and titles of his estate;" *Davies v. Waters*, 9 M. & W. 606, 612.

Discovery and inspection of criminating documents.—As to the law applied by the English Common Law Courts in cases where inspection is sought of a document, the production of which might expose the party producing it to criminal proceedings, see *Hill v. Campbell*, L. R., 10 C. P., 222. The question in that case turned on the language of the English Criminal Law Procedure Acts, and on whether a Court of Equity would grant discovery in a case in which the matter discovered would be material for a criminal indictment. Coleridge, C. J., after contrasting the statements of Mr. Hare and Mr. Justice Storey as to the results of the rulings on the point, and expressing his concurrence with the latter, observed (page 248); "There is, however, no case, as far as I have been able to ascertain, in which a defendant in equity has ever been himself compelled to answer as to matters which might expose him to an indictment for libel; and the cases I have cited are strong authorities to show that a Court of Equity would not compel him."

By the Civil Procedure Code, 1882, the witness should, however, bring the document to Court, and the Judge will decide on the objection to its production. See Section 162.

Attorney's lien.—As to the lien of Attorneys and others on their client's papers, see Contract Act, 1872, Sections 171 and 221. The lien is general, *In re Broomhead*, 5 D. & L., 52, unless confined by agreement to the special purpose for which they were delivered; *Ex parte Sterling*, 16 Ves., 258. It is not confined to papers. *Friswell v. King*, 15 Sim., 191. A solicitor is not bound to produce papers on which he has a lien. See Bray on Discovery, Bk. II, Ch. II., Pt. III. Sec. 2. See too Annual Practice Note to O. 31 r. 1.

As to lien as an excuse for non-production, "a witness," says Mr. Taylor, "will not be allowed to resist a *sub. duc. tecum* on the ground of any lien he may have on the document called for as evidence, unless the party requiring the production be himself the person against whom the claim of lien is made."—*Tayl.*, § 458.

Production of documents which another person, having possession, would be entitled to refuse to produce.

131. No one shall be compelled to produce documents in his possession, which any other person would be entitled to refuse to produce if they were in his possession, unless such last-mentioned person consents to their production.

Note.

By Section 65, secondary evidence can be given when a document is in the custody of a person who is *legally bound to produce it* and who refuses to do so. In the case, therefore, of a document protected under this or the preceding section, secondary evidence of its contents could not be given.

Witness not excused from answering on ground that answer will criminate.

132. A witness shall not be excused from answering any question as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend, directly or indirectly, to criminate such witness, or that it will expose, or tend, directly or indirectly to expose such witness to penalty or forfeiture of any kind :

Proviso.

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any

arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer.

Note.

English rule as to criminating questions.—The rule is otherwise in England. There a witness need not answer any question, the answer to which would have a tendency to criminate him. Under this rule the question has often been discussed how far the witness' statement of his belief that the answer would criminate him is conclusive: it is now laid down that it is not conclusive, but that the Court must be satisfied from the circumstances of the case that there is a reasonable apprehension of danger if the answer were given. No such question can arise under the present section, the witness being bound to give an answer although its effect may be to criminate or expose him to penalty or forfeiture. The answer so given cannot, unless it be false, be ground for any subsequent criminal proceeding: but it might be made use for any purpose in a Civil suit.

The proviso to this section does not protect a witness who gives incriminating evidence voluntarily. It only applies when he objects to give evidence and is compelled by the Court to do so; *Queen-Empress v. Ganu Souba*, I. L. R., 12 Bom., 440. See too *R. v. Gopal Das*, I. L. R., 3 Mad. 271; *R. v. Samiappa*, I. L. R., 15 Mad., 68. In *Mohar Sheikh v. the Queen*, I. L. R., 21 Cal., 392, it was held that the words "shall be compelled to give" applied only to pressure put upon the witness after he had gone into the box, and asked to be excused from answering a question.

A witness is not exempt, in England, from answering a relevant question or producing a relevant document merely on the ground that the answer or the document would expose him to a civil action; *Steph. Dig.* § 118. The same rule would, *a fortiori*, apply in India, as even the fact that the answer may incriminate him is no excuse for refusing to answer.

Penalties for refusing to give evidence, and for perjury.—As to punishment for refusal to give evidence, see Indian Penal Code, Section 179; for giving false evidence, Section 193, Indian Penal Code, and see Crim. Proc. Code, Schedule V, XXVIII (1) 4 ("Alternative charges on Section 193"), from which it appears to be enough to show contradictory statements in order to secure a conviction. This is otherwise in England.—*Tayl.*, § 962.

A witness refusing to give evidence or produce a document is liable to a suit for damages under Act XIX of 1853, Section 26: see Appendix II and the Civil Procedure Code, 1882, Sections 168, 175.

Accomplice.

133. An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice.

Note.

An accomplice is a competent witness against an accused.—This section lays down the law as it has been repeatedly admitted to exist in England. An accomplice comes into Court with a confessedly bad character, and deeply interested in the result of the case. Hence “the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars.” (Section 114 (*b*).) Necessity, however, compels the admission of the testimony of accomplices, since, if it were excluded, it would frequently be impossible to find evidence to convict the greatest offenders. *Hawk*, P. C., b. 2, c. 46, s. 94: *Roscoe*, Criminal Evidence, 12th ed., 113. The necessity which compels the reception of such testimony requires the rule here laid down, that the testimony, when received, may suffice, even though uncorroborated. The rule, however, is one more generally honored in the breach than in the observance. Prejudice against the admitted participator in a crime, deeply interested in the result of the trial, on the one hand,—and the necessity for the general principle contained in this section and in numerous reported cases, on the other hand—have produced the anomaly that, while the principle is fully acknowledged it is almost invariably disregarded in practice. The practice of Judges in England is to *advise* juries not to convict upon the uncorroborated evidence of an accomplice. A Jury cannot be *directed* to acquit under such circumstances, because it cannot be said that there is no evidence before them.

A Judge will, therefore, do properly in charging a Jury in such a case, to comment on the degree to which the evidence is, in the particular case, trustworthy or the reverse, to point out the danger, in ordinary cases, of relying on such testimony. His omission to do so, may, if, in the opinion of the Appellate Court, it has prejudiced the appellant, amount to an error of law and be ground for setting aside the verdict; *R. v. Etahi Baksh*, B. L. R., Sup. Vol. F. B. 459; 5 W. R., Cr. 80.

Witnesses who to avoid pecuniary injury bribe officers of the revenue who are themselves charged with bribery are “accomplices;” *Queen-Empress v. Maganlal*, I. L. R., 14 Bom., 115: see *Queen-Empress v. O'Hara*, I. L. R., 17 Cal., 642.

Corroboration of accomplice.—It has been frequently held that the testimony of approvers should be corroborated as to the identity of the accused; *Roscoe*, Crim. Ev., 12th ed., 114-118; *R. v. Budhu Nanku*, I. L. R., 1 Bom., 475. "Not only as to persons spoken of by an accomplice must there be corroborative evidence, but, which is more important still, as to the *corpus delicti* there must be some *primâ facie* evidence pointing the same way to make the evidence of an accomplice satisfactory. As has been recognized in many cases, the man who charges another with the commission of a crime, in which he is himself implicated, requires corroboration as to the particular person, but still more as to the existence itself of any crime, or of the particular crime, from the penalty for which he is made free on the understanding that his testimony will be valuable for the prosecution;" *R. v. Chatur Purshotam*, I. L. R., 1 Bom., 476. *Note*. The evidence requisite for the corroboration of the testimony of an accomplice must proceed from an independent and trustworthy source, and previous statements, made by the accomplice himself, though consistent with the evidence given by him at the trial, are insufficient for such corroboration. The confession of one of the prisoners cannot be used to corroborate the evidence of an accomplice against the others. Under Section 30 such confession can be taken into consideration against the accused but, as it requires corroboration itself, it does not add to the weight of the testimony of the accomplice; *R. v. Malipâ bin Kapandâ*, 11 Bom. H. C. Rep., 196. See the notes to Sections 30, 114, and 157.

It would, of course, be only under some special circumstances that a conviction could be had on the uncorroborated testimony of an accomplice.

But such evidence must, like that of any other witness, be considered and weighed by the Judge, who in doing so should not overlook the position in which the witness, at the time of giving his evidence, may stand, and the motives which he may have for stating what is false. If the Judge after making due allowance for these considerations and the probabilities of the story, comes to the conclusion that the evidence though uncorroborated is true, and the evidence, if believed, establishes the guilt of the prisoner, it is his duty to convict; Per Edge, C. J.; *Queen-Empress v. Gohardhan*, I. L. R., 9 All., 528, at p. 555.

Mr. Taylor, § 971, mentions one class of accomplices, whose evidence does not, in his opinion, require corroboration, *viz.*, persons, who have been at one time in communication with the criminals, but have subsequently abandoned the conspiracy and denounced it to the public authorities, under whose directions they continue to act till the matter

If the relevancy of one alleged fact depends upon another alleged fact being first proved, the Judge may, in his discretion, either permit evidence of the first fact to be given before the second fact is proved, or require evidence to be given of the second fact before evidence is given of the first fact.

Illustrations.

(a) It is proposed to prove a statement about a relevant fact by a person alleged to be dead, which statement is relevant under Section 32.

The fact that the person is dead must be proved by the person proposing to prove the statement before evidence is given of the statement.

(b) It is proposed to prove by a copy the contents of a document said to be lost.

The fact that the original is lost must be proved by the person proposing to produce the copy before the copy is produced.

(c) A is accused of receiving stolen property knowing it to have been stolen.

It is proposed to prove that he denied the possession of the property.

The relevancy of the denial depends on the identity of the property. The Court may, in its discretion, either require the property to be identified before the denial of the possession is proved, or permit the denial of the possession to be proved before the property is identified.

(d) It is proposed to prove a fact (A) which is said to have been the cause or effect of a fact in issue. There are several intermediate facts (B, C and D) which must be shown to exist before the fact A can be regarded as the cause or effect of the fact in issue. The Court may either permit A to be proved before B, C or D is proved or may require proof of B, C and D before permitting proof of A.

137. The examination of a witness by the party who calls him shall be called his examination-in-chief. Examination-in-chief.

The examination of a witness by the adverse party shall be called his cross-examination. Cross-examination.

The examination of a witness, subsequent to the cross-examination, by the party who called him shall be called his re-examination. Re-examination.

Note.

Where a prisoner calls a witness who gives evidence adverse to a co-accused prisoner, the witness may be cross-examined by the latter; *Ramchand Chatterjee v. Hanif Sheikh*, I. L. R., 21 Cal., 401.

138. Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him (*sic*) so desires) re-examined. Order of examinations.
Direction of re-examination.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.⁽¹⁾

The re-examination shall be directed to the explanation of matters referred to in cross-examination; and if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter.

Note.

(1) **Examination and cross-examination.**—This sub-section must be read along with Sections 146, 154, 155 and 156, which provide for questions as to certain matters, other than relevant facts, being asked.

In America a witness can be cross-examined only as to circumstances connected with his examination-in-chief. If it is wished to examine him as to other matters, the party must make him his own

witness and use him as a witness in his own case. No such restriction exists in England or under the present Act.

Cross-examination of person called to produce a document.

139. A person summoned to produce a document does not become a witness by the mere fact that he produces it, and cannot be cross-examined unless and until he is called as a witness.

Note.

Witness summoned to produce need not attend personally.—By Section 164 of the Civil Procedure Code, 1882, a person, who is summoned merely to produce a document, is deemed to have complied with the summons if he cause such document to be produced instead of attending personally to produce it.

Witnesses to character.

140. Witnesses to character may be cross-examined and re-examined.

Leading question.

141. Any question suggesting the answer which the person putting it wishes or expects to receive, is called a leading question.

When they must not be asked.

142. Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

Note.

The Court may also, under Section 154, allow a witness to be asked leading questions by the party who calls him.

When they may be asked.

143. Leading questions may be asked in cross-examination.

Note.

Leading questions.—According to the American law, the Court has the power to stop leading questions being put in cross-examination to

a witness who shows an obvious bias against the party who called him, and in favor of the cross-examiner.

Though this power is not conferred by the present law, a Judge is, of course, at liberty to intimate that, under the circumstances of the case, the witness should be left to tell his own story, and, if this intimation is not complied with, to take it into account in estimating the value of the evidence. The right to ask leading questions does not mean that an advocate is, in cross-examination, to put into a witness' mouth the very words which he is to echo back: nor ought he to assume as proved facts which have not been proved, or evidence given which has not been given; *R. v. Hardy*, 24 Howell State Trials, 755.—*Tayl.*, § 1481.

144. Any witness may be asked, whilst under examination, whether any contract, grant or other disposition of property, as to which he is giving evidence, was not contained in a document, and if he says that it was, or if he is about to make any statement as to the contents of any document, which, in the opinion of the Court, ought to be produced, the adverse party may object to such evidence being given until such document is produced, or until facts have been proved which entitle the party who called the witness to give secondary evidence of it.

Evidence as to
matters in
writing.

Explanation.—A witness may give oral evidence of statements made by other persons about the contents of documents if such statements are in themselves relevant facts.

Illustration

The question is, whether A assaulted B.

C deposes that he heard A say to D—'B wrote a letter accusing me of theft, and I will be revenged on him.' This statement is relevant, as showing A's motive for the assault, and evidence may be given of it, though no other evidence is given about the letter.

Note.

Evidence as to matters in writing.—This section merely points out the manner in which the provisions of Sections 91 and 92, as to the exclusion of oral by documentary evidence, may be enforced by the parties to the suit. “Documents which in the opinion of the Court ought to be produced” would, of course, include the cases referred to in Section 91, where the law requires a matter to be reduced to the form of a document.

Cross-examination as to previous statements in writing.

145. A witness may be cross-examined as to previous statements made by him in writing or reduced into writing and relevant to matters in question without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

Note.

Cross-examination as to previous statements in writing.—The present section corresponds with the English law (Common Law Procedure Act, 1854, Section 24), which superseded the common law rule to the contrary effect.

It is often important that, when a witness is under cross-examination as to his previous statements, the fact of their having been reduced to writing should be concealed from him. It is only reasonable, however, that when he has given his answer, he should, before the document, which is to be used for the purpose of contradicting him, is proved, be allowed to see it and have the chance of correcting himself. Questions under this section may, with the permission of the Court, be asked of the witness by the party who called him: Section 154.

It must be remembered that the rule here laid down applies only if the previous statement in question was relevant to the matter in question.

In *Munchershaw Bezonji v. New Dhurumsey Spinning Company*, I. L. R., 4 Bom., 577, it was held that, where A had been employed by B, at intervals of a week or fortnight, to write up B's account books, on information or loose memoranda, supplied by B, the entries so

made by A could not be used, under this section, to contradict A, inasmuch as the statements were not really A's but B's, by whose instructions they were written.

As to contradictions of this and every other class, the following caution, quoted from the observations of the Punjab Government on the Criminal Report for 1871, is worthy of attention.

"The contradictions and transparent falsehoods of witnesses often carry more weight with English Judges than is reconcileable with equity and a knowledge of the character of the people. A case may be in the main true, and would win on its merits alone, but an ignorant witness, doubtful of the procedure of the Courts, and anxious to make his story fit the opinion which he perceives the Judge has formed, embellishes it with imaginary incidents, which are dissipated under cross-examination, or contradicted by other witnesses, and the case is dismissed, the Judge believing, what is by no means necessarily correct, that a story must be false which the witnesses seek to establish with the assistance of falsehood. It is rather by a patient study of the character of the people and an intimate acquaintance with their habits and modes of thought, than by the application of general principles of evidence, that a Magistrate can hope to discriminate between truth and falsehood in an Indian Law Court."

146. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend

Questions lawful in cross-examination.

- (1) to test his veracity ;
- (2) to discover who he is and what is his position in life, or
- (3) to shake his credit, by injuring his character, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture.

Note.

Questions lawful in cross-examination.—This does not mean that a witness may be asked questions on irrelevant topics for the mere purpose of contradicting him or of proving contradictory statements. For, unless they come within the Exceptions mentioned in Section

153, his answers to questions tending to shake his credit cannot be contradicted; nor by Section 155, can former contradictory statements be proved, unless that part of the witness' evidence, which they contradict, was itself liable to be contradicted.

"The laws of evidence on this subject, as to what ought and what ought not to be received, must be considered as founded on a sort of comparative consideration of the time to be occupied in examinations of this nature, and the time which it is practicable to bestow upon them. If we lived for a thousand years instead of about sixty or seventy, and every case were of sufficient importance, it might be possible, and perhaps proper, to throw a light on matters in which every possible question might be suggested, for the purpose of seeing by such means whether the whole was unfounded, or what portion of it was not, and to raise every possible inquiry as to the truth of the statements made. But I do not see how that could be; in fact, mankind find it to be impossible." *Per Rolfe, B., in Attorney-General v. Hitchcock*, 1 Ex., 91, 105.

A party may discredit his own witness on general grounds.—Questions under this section may, with the permission of the Court be asked of a witness when he is being examined-in-chief or re-examined: see Section 154. Accordingly, a party may, if the Court permits, discredit his own witness on general grounds, which he cannot do in England.

When witness
to be compelled
to answer.

147. If any such question relates to a matter relevant to the suit or proceeding, the provisions of Section 132 shall apply thereto.

Court to
decide when
question shall
be asked and
when witness
compelled to
answer.

148. If any such question relates to a matter not relevant to the suit or proceeding, except in so far as it affects the credit of the witness by injuring his character, the Court shall decide whether or not the witness shall be compelled to answer it, and may, if it thinks fit, warn the witness that he is not obliged to answer it. In exercising its discretion, the Court shall have regard to the following considerations:—

(1.) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the

Court as to the credibility of the witness on the matter to which he testifies.

(2.) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the Court as to the credibility of the witness on the matter to which he testifies.

(3.) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness' character and the importance of his evidence.

(4.) The Court may, if it sees fit, draw from the witness' refusal to answer, the inference that the answer if given would be unfavourable.

Note.

Protection of witness against improper questions.—The Court has the power either of prohibiting questions under this section, or, if the question be allowed, of drawing or not drawing an inference from a witness' refusal to answer. The exclusions provided in (2) and (3) and in Sections 151, 152 indicate, with more distinctness than is to be found in the English law, the principles on which the Court should proceed in protecting witnesses from reckless and unjustifiable interrogation. A witness is not to have his whole past life raked up and dragged into publicity merely because he comes forward in obedience to the law to give evidence in Court: so serious a private inconvenience can be justified only by a real necessity; and it is not so justified when either the imputation, if true, would not affect the witness' credibility, or when the injury to the witness' character is very serious, while the importance of the evidence is very small. A woman who, in some question of contract, is asked, "did you not, twenty years ago, have an illegitimate child?" has a right to be protected on the ground, 1st, that if she had, it does not affect her truthfulness; and 2nd, that it is not worth while to endanger her reputation for so trifling a cause.

In England in cases of indecent assault or attempt at rape, the prosecutrix cannot be asked if she had not previously had connection with a man other than the prisoner, for the question is not relevant to the issue, *R. v. Hodgson*, 11. & R., 211; *R. v. Clarke*, 2 Stark, N. P. C. 241; *R. v. Cockroft*, 11 Cox, Cr. C., 410; *R. v. Holmes*, L. R., 1 C. C. R., 334. The Judgment of Coleridge, J., in *R. v. Robins*, 2 Moo. & Rob., 512, affirming the contrary, has more than once been denounced as bad law. But see Section 155 (4).

In *R. v. Martin*, 6 C. & P., 562, the evidence was as to the prosecutrix having previously had connection with the prisoner, and in *R. v. Barker*, 3 C. & P., 589, the question was as to evidence showing the prosecutrix to be a common prostitute; in these cases the evidence was held to be admissible for it has a direct bearing upon the question of assent. Section 155 (4) allows of proof in such cases, that the prosecutrix was of generally immoral character.

As to the rule laid down in sub-section (4), see Section 114 (h).

Sir James Stephen gives a question, asked in the famous "Clamant" case, as an illustration of the length to which, in some cases, the right of asking discrediting questions may be carried. The question was whether A committed perjury in swearing that he was R. T. B swore that he made tattoo marks on the arm of R. T., which were not and could never have been on the arm of A. B was asked and compelled to answer the question whether many years after the alleged tattooing and many years previous to the trial, he committed adultery with the wife of one of his friends. *Steph. Dig.*, § 129.

Question not to be asked without reasonable grounds.

149. No such question as is referred to in Section 148 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well-founded.

Illustrations.

(a) A barrister is instructed by an attorney or wakil that an important witness is a dacoit. This is a reasonable ground for asking the witness whether he is a dacoit.

(b) A pleader is informed by a person in Court that an important witness is a dacoit. The informant on being questioned by the pleader gives satisfactory reasons for his statement. This is a reasonable ground for asking the witness whether he is a dacoit.

(c) A witness, of whom nothing whatever is known, is asked at random whether he is a dacoit. There are here no reasonable grounds for the question.

(d) A witness, of whom nothing whatever is known, being questioned as to his mode of life and means of living, gives unsatisfactory answers. This may be a reasonable ground for asking him if he is a dacoit.

Note.

Reasonable grounds.—The Illustrations show that the “reasonable grounds,” which justify such questions, may be much slighter than would justify a man in making an imputation under other circumstance. A barrister who is told a discrediting fact by an attorney or vakil, or a pleader who hears such a fact from a person who appears to know about it, is justified in so far as assuming its truth as to question a witness about it; and he may even do so with no other justification than the witness’ unsatisfactory replies.

150. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any barrister, pleader, vakil or attorney, report the circumstances of the case to the High Court or other authority to which such barrister, pleader, vakil or attorney is subject in the exercise of his profession.

Procedure of Court in case of question being asked without reasonable grounds.

151. The Court may forbid any questions or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

Indecent and scandalous questions.

See notes to Section 148.

152. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which, though proper in itself, appears to the Court needlessly offensive in form.

Questions intended to insult or annoy.

Exclusion of evidence to contradict answers to questions testing veracity.

153. When a witness has been asked and has answered any question which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him ; but if he answers falsely, he may afterwards be charged with giving false evidence.

Exception 1.—If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.⁽¹⁾

Exception 2.—If a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted.⁽²⁾

Illustrations

(a) A claim against an underwriter is resisted on the ground of fraud.

The claimant is asked whether, in a former transaction, he had not made a fraudulent claim. He denies it.

Evidence is offered to show that he did make such a claim.

The evidence is inadmissible.

(b) A witness is asked whether he was not dismissed from a situation for dishonesty. He denies it.

Evidence is offered to show that he was dismissed for dishonesty.

The evidence is not admissible.

(c) A affirms that on a certain day he saw B at Lahore.

A is asked whether he himself was not on that day at Calcutta. He denies it.

Evidence is offered to show that A was on that day at Calcutta.

The evidence is admissible not as contradicting A on a fact which affects his credit, but as contradicting the alleged fact that B was seen on the day in question in Lahore. (3)

In each of these cases the witness might, if his denial was false, be charged with giving false evidence.

(d) A is asked whether his family has not had a blood feud with the family of B against whom he gives evidence.

He denies it. He may be contradicted on the ground that the question tends to impeach his impartiality.

Note.

This section is based upon the rule of English law that, if questions put to a witness for the purpose of testing his credit relate to relevant facts, they can be contradicted by independent evidence; if to irrelevant, they cannot. It is obvious that, but for such a rule, a suit might easily digress into a various collateral issues and become practically interminable. The exceptions refer to two matters which are easily susceptible of proof and strike at the very root of the witness' trustworthiness. It is very important to know whether a witness has been previously convicted, or has received a bribe from the other party. On the other hand no great expenditure of time need be involved in ascertaining how the facts stand.

(1) **Proof of previous conviction.**—That evidence is necessarily the conviction itself. In *R. v. Watson*, 2 Stark., 149, Lord Ellenborough observed: "For the purpose of ascertaining the credit due to witnesses, the Courts indulge free cross-examination: but when a crime is imputed to a witness, of which he may be convicted by due course of law, the Court knows but one medium of proof, the record of conviction." As to how a previous conviction is to be proved, see Sections 76 and 77.

(2) **Impeachment of witness' impartiality.**—As *e.g.*, that the witness has been endeavouring to suborn witnesses against a party to the proceeding.

A denial includes refusal to admit; a witness who is asked, 'were you convicted last year of perjury?' or, 'have you not received Rupees 50 from the defendant about this case?' and says that he does not know or that he has forgotten, practically denies it.

The distinction made between cases coming within the section and those within *Exception 2* is exemplified in *Yewin's case*. "One Yewin was indicted for stealing wheat. The principal witness against him was a boy of the name of Thomas, his apprentice. Lawrence, J., allowed the prisoner's counsel to ask Thomas in cross-examination, whether he had not been charged with robbing his master, and whether he had not afterwards said, he would be revenged of him,

and would soon fix him in Monmouth gaol? He denied both. The prisoner's counsel then proposed to prove, that he had been charged with robbing his master, and had spoken the words imputed to him. Lawrence, J., ruled that his answer must be taken as to the former; but that, as the *words* were material to the guilt or innocence of the prisoner, evidence might be adduced that they were spoken by the witness." Note to *Harris v. Tippet*, 2 Camp., 638. That a witness has been bribed may, of course, be proved; *R. v. Langhorn*, 7 St. Tr., 466; or that he has tried to suborn others, *R. v. Lord Strafford*, *Ibid.*, 400; *Attorney-General v. Hitchcock*, 1 Ex., 91. But the question must be one which goes directly to prove, and not merely to suggest, improper conduct or partiality of the witness. "A distinction should be observed between those matters which may be given in evidence by way of contradiction, as directly affecting the story of the witness touching the issue before the jury, and those matters which affect the motives, temper, and character of the witness, not with respect to his credit, but with reference to his feelings towards one party or the other;" *Attorney-General v. Hitchcock*, *Ibid.*, 100.

Question by
party to his
own witness.

154. The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.

Note.

When a party may show general bad character of his witness.—The person, who calls a witness, may, with the permission of the Court, ask him questions to show his general bad character; this is not permitted by the English law.

This is an extension of Section 142; the Court may, in its discretion, allow leading questions to be put in the Examination-in-chief or re-examination under the present section.

Impeaching
credit of wit-
ness.

155. The credit of a witness may be impeached in the following way by the adverse party, or, with the consent of the Court, by the party who calls him:—

(1.) By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit;

(2.) By proof that the witness has been bribed

or has accepted ⁽¹⁾ the offer of a bribe, or has received any other corrupt inducement to give his evidence ;

(3.) By proof of former statements inconsistent with any part of his evidence which is liable to be contradicted ;⁽²⁾

(4.) When a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character.⁽³⁾

Explanation.—A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives cannot be contradicted, though, if they are false, he may afterwards, be charged with giving false evidence.⁽⁴⁾

Illustrations.

(a) A sues B for the price of goods sold and delivered to B. C says that he delivered the goods to B.

Evidence is offered to show that, on a previous occasion, he said that he had not delivered the goods to B.

The evidence is admissible.

(b) A is indicted for the murder of B.

C says that B, when dying, declared that A had given B the wound of which he died.

Evidence is offered to show that, on a previous occasion, C said that the wound was not given by A or in his presence.

The evidence is admissible.

Note.

Impeaching credit of a witness.—In England the right of the party calling a witness to discredit him was for a long time a disputed point. Since 1854 the rule has been that a party, calling a witness, may not

impeach his credit by general evidence of bad character: but in case of a witness, whom the Judge considers "hostile," (as opposed to merely "unfavourable.") may contradict him by other evidence or, with the leave of the Judge, prove other inconsistent statements. The present section is more general, and, subject to the permission of the Court, enables the party, calling a witness who proves 'hostile,' to put any question that could be asked in cross-examination.

The credit of a witness is, of course, indirectly impeached by evidence disproving the facts which he has asserted: provision for this is made in Section 5. It may be directly impeached by such questions as are provided for in Section 146, 154, or 155. But it is often further necessary to give independent testimony as to the character of the witness with a view to showing that he is unworthy of belief: and this may be done in the four ways specified in the section.

The Bombay High Court, in *R. v. Sackaram Muckunji*, 11 Bom., 166, appear to consider that the provision of the Indian Evidence Act for the contradiction of witnesses is less extensive than that of the English law. If, however, Section 5 be read with these sections it will, I think, be seen that they are identical.

A person may be questioned about a statement made by him to a police officer and with a view to impeaching his credit, the police officer or any other person in whose hearing the statement was made can be examined on the point.—*Queen-Empress v. Sitaram Vithal*, 11 L. R., 11 Bom., 657.

Foundation for discrediting a witness need not be laid.—By the English law it is necessary, before giving evidence for the purpose of discrediting a witness, to lay a foundation for the evidence to be given by the interrogation of the witness himself and his denial. This is not necessary under the present Act.

(1) **Acceptance of bribe or of the offer of a bribe, may be proved, but mere offer cannot.**—The word "accepted" was substituted by Act XVIII of 1872 for the word "offered." The substitution was grounded, probably, on the ruling in the English case, *Attorney-General v. Hitchcock*, 1 Ex., 91, where a witness in a revenue case was asked whether he had not said that the revenue officers had offered him £20 to give the evidence which he did, and denied having said so: and the Court refused to admit evidence to contradict him. In that case, during the argument, Alderson, B., (page 98) pointed out that those, who seek to adduce such evidence, "endeavour to fix the corrupt state of mind upon the person to whom the offer is made, and not upon him who makes the offer. The offer, without acceptance, is

nothing as regards the person to whom the offer is made." In delivering judgment, Pollock, C. B., observed, " In this case it is admitted, that, with reference to the offering of a bribe, it could not originally have been proved that the offer of the bribe had been made to the witness to make a particular statement, the bribe not having been accepted by him. And the reason is that it is totally irrelevant to the matter in issue that some person should have thought fit to offer a bribe to the witness to give an untrue account of a transaction, and it is of no importance whatever if that bribe was not accepted. It is no disparagement to a man that a bribe is offered to him: it may be a disparagement to the person who makes the offer." The offer may be some evidence of the opinion of the person offering that the witness is open to a bribe; but that opinion may be mistaken and, whether correct or not, must, in strictness, be regarded as irrelevant.

On the other hand it is sometimes possible to prove that a bribe has been offered, although its acceptance may be denied. And the fact that such an offer has been made is one which might not unreasonably be borne in mind by a Judge, who is endeavouring, as Indian Judges often have to do, with very scanty materials, to estimate a witness' claim to belief. Supposing the evidence to establish, and the witness to admit, that the opposite party had been in communication with him and had taken active steps to tamper with his truthfulness, is not this fact one which any reasonable tribunal would take into consideration, although the actual acceptance of the bribe could not be proved? The alteration, like several of the amendments introduced by Act XVIII of 1882, appears to have been made without adequate regard to the considerations which led the original framers of the Act to word it as they did.

(2) **Previous inconsistent statements liable to contradiction.**—That is, any part of his evidence, which relates to a fact in issue or relevant, or which falls within the Exceptions to Section 153: See *Khadijah Khanum v. Abdool Kurreem Sheraji*. 1. L. R., 17 Cal., 344.

E.g., a witness who has sworn to seeing a murder committed, and who has denied having been previously convicted or having received a bribe from either party, may be discredited by proof of his having made a contradictory statement as to either of these points.

So, if a witness' opinion is relevant as to sanity or identity, he may be asked if he has not expressed a contrary opinion; but where a witness has merely spoken to a fact, a previous expression of opinion by him as to the merits of the case is not relevant, and, therefore, if he denies having made it, he cannot be contradicted; *Tayl.*, § 1445, *Attorney-General v. Hitchcock*. 1 Ex., 91.

(3) **Proof of immoral character of prosecutrix.**—The previous conduct of the prosecutrix might also, in such a case, be shown to be relevant under Section 8.

(4) **Reasons for belief as to untrustworthiness of a witness.**—It is very dangerous in cross-examination to ask a witness his reasons for believing a witness to be untrustworthy. He is, by such a question, enabled to state any unfavourable fact without fear of contradiction.

Questions
tending to cor-
roborate evi-
dence of rele-
vant fact, ad-
missible.

156. When a witness whom it is intended to corroborate gives evidence of any relevant fact, he may be questioned as to any other circumstances which he observed at or near to the time or place at which such relevant fact occurred, if the Court is of opinion that such circumstances, if proved, would corroborate the testimony of the witness as to the relevant fact which he testifies.

Illustration.

A, an accomplice, gives an account of a robbery in which he took part. He describes various incidents unconnected with the robbery which occurred on his way to and from the place where it was committed.

Independent evidence of these facts may be given in order to corroborate his evidence as to the robbery itself.

Note.

Corroborative Evidence.—This section provides for the admission of evidence given for the purpose, not of proving a relevant fact, but of testing the witness' truthfulness. There is often no better way of doing this than by ascertaining the accuracy of his evidence as to surrounding circumstances, though they are not so immediately connected with the facts of the case as to be themselves relevant. While, on the one hand, important corroboration may be given in the case of a truthful witness, a valuable field for cross-examination and exposure is afforded in the case of a false witness. In order to prepare the ground for their corroboration, it is necessary to elicit these surrounding circumstances in the first instance from the witness himself, and for this the section makes provision.

157. In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

Former statements of witness may be proved to corroborate later testimony as to same fact.

Note.

Previous statements as corroboration.—This section, as did the Evidence Act before in force in India, in opposition to the generally received rule in England, allows a witness to be corroborated by proof that he has said the same thing on a previous occasion, the only condition being that this previous statement shall have been made either about the time of the occurrence, or before a competent authority. This condition is, to some extent, a safeguard against fictitious statements designedly made to support subsequent evidence; but it is obvious that the corroborative value of such previous statements depends entirely on the circumstances of each case; and that they may easily be entirely valueless. As independent evidence of a fact statements are, by Section 8, relevant as conduct, if they accompany and explain facts other than statements. The mere fact of a man having on a previous occasion made the same assertion adds but infinitesimally to the chances of its truthfulness: and Judges should distinguish it from really corroborative evidence.

In *R. v. Malápd bin Kapaná*, 11 Bom. H. C. Rep., 196, the Sessions Judge based the conviction of the prisoner upon the testimony of an approver, and used the statements, made by the approver to his parents and the police, to corroborate his evidence at the trial. Nanábhái Haridas, J., in delivering the judgment of the High Court of Bombay on appeal, observed (p. 197), "Section 157 of the Evidence Act, no doubt, provides that any former statements made by a witness at or about the time when the fact in issue took place, or before any competent authority, may be proved to corroborate his testimony; and, accordingly, the Session Judge has made use of Murgíás' statements, made on different occasions to his parents and to police officers, shortly after the murder. But such corroboration, we think, hardly suffices. It can scarcely be said to answer the purpose for which juries are advised by Judges to require the evidence of an accomplice to be confirmed. From the position, in which he stands, it is considered unsafe to act upon his evidence alone. Hence the rule requiring confirmation of it as to the prisoners by some independent, reliable evidence. But his statement, whether

made at the trial or before the trial, and in whatever shape it comes before the Court, is still only the statement of an accomplice, and does not at all improve in value by repetition."

What matters may be proved in connection with proved statement relevant under Section 32 or 33.

158. Whenever any statement, relevant under Section 32 or 33, is proved, all matters may be proved, either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.

Note.

Rules relating to the impeaching or confirming of a witness' credit apply also to cases coming under Section 32 or 33.—This refers to certain statements, made by persons, who from some unavoidable cause cannot be produced, of which under Sections 32 and 33 evidence may, in the circumstances there described, be given. The present section has the effect of exposing any such statement, when admitted, as far as may be, to all the scrutiny and giving it the advantage of all the corroboration, which it would have had on the cross-examination of the person making it.

Refreshing memory.

159. A witness may, while under examination, refresh his memory by referring to any writing⁽¹⁾ made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory.

The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct.⁽²⁾

When witness may use copy of document to refresh memory.

Whenever a witness may refresh his memory by reference to any document, he may, with the permission of the Court, refer to a copy of such

document: Provided the Court be satisfied that there is sufficient reason for the non-production of the original.

An expert may refresh his memory by reference to professional treatises.

Note.

(1) **Refreshing Memory.**—Human memory and human inaccuracy being what they are, an important aid to exactness would, it is obvious, be thrown away, if witnesses were not at liberty to fortify their recollection by reference to written memoranda. All that the law does here is to prescribe certain conditions with a view to securing that the memoranda so employed shall be trustworthy. These conditions are laid down in the section. As to what is the time, within which the Court will consider it likely that a transaction would be fresh in the witness' memory, much must depend on the circumstances of each case. Mr. Taylor mentions a Scotch case, in which the Court refused to allow a witness to refresh his memory by referring to notes, prepared by himself some weeks after the occurrence of the transaction and after he had reason to believe that he would be called to give evidence.—*Tayl.*, § 1406. Notes prepared at the instance of the party calling the witness are especially objectionable; *Steinkeller v. Newton*, 9 C. & P., 815. It is not, however, necessary that the document should be admissible in evidence. A document, accordingly, inadmissible for want of a stamp or registration, may be used for this purpose.—*Tayl.*, § 1411.

Where the document consists of entries or a memorandum, compiled from notes taken or entries made at the time, it may be still regarded as an original document, if it falls within the requirements of the two first sub-sections of clause 159; *Burton v. Plumer*, 2 A. & E., 844.

In *Horne v. Mackenzie*, 6 Cl. & Fin., 628, a surveyor was allowed to refresh his memory from the printed copy of a report, compiled from his original notes, of which it has substantially, though not literally, a copy.

A police officer may refresh his memory by referring to documents, in which, under s. 119 of Act X of 1872, he has reduced into writing statements made during an investigation; *Roghuni Singh v. Empress*, I. L. R., 9 Cal., 455.

A statement reduced to writing by a police officer under s. 162 of the Criminal Procedure Code cannot be used in evidence for the

accused. But the police officer to whom it was made may use it to refresh his memory and may be cross-examined upon it by the party against whom the testimony is given; *Queen-Empress v. Sitaran Vithal*, I. L. R., 11 Bom., 657.

There is "no authority for saying that a witness can be compelled to refresh his memory from any document, unless the document is either in the possession of the party who desires to put it to the witness, or is at least such as he can insist on having produced;" *In re Kali Churn Chunari*, I. L. R., 8 Cal., 154; 10 C. L. R., 51.

(2) **The document may have been written by another person.**—So a witness may refer to entries in a log-book not made by himself, but examined by him from time to time while the occurrences were recent; to depositions made by him in another Court, the correctness of which he ascertained at the time; to minutes made by another person which he has checked; or to a receipt which he has seen given.—*Tayl.*, § 1410.

Testimony to facts stated in document mentioned in Section 159.

160. A witness may also testify to facts mentioned in any such document as is mentioned in Section 159, although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

Illustration.

A book-keeper may testify to facts recorded by him in books regularly kept in the course of business, if he knows that the books were correctly kept, although he has forgotten the particular transactions entered.

Note.

Independent recollection of the transaction unnecessary.—This is an important extension of the rule laid down in the preceding section. A witness may have no recollection of a transaction and may be unable, even with the aid of the document, to recall it, and yet, from seeing the document or his signature upon it, may be able to speak with positiveness to the occurrence of the transaction.

Thus, a solicitor who has made a parol lease and entered a memorandum of it in his book may refer to it though he has no independent recollection of the transaction: so, a barrister to the notes on his brief in order to show that a witness has varied in his statement. So, also, a witness may look at his own attestation to a deed and say that from seeing it he is sure that he saw the party execute it, though

he has no recollection of the fact: and a banker's clerk may, from seeing his writing on a bill of exchange, be able to swear that it passed through his hands.—*Tayl.*, § 1412.

What the witness' evidence in such cases comes to is this: "I know that signature to be mine, and from seeing the signature, I am positive that the transaction occurred."

The word "document" might be held to include "copy of such a document," to which reference is made in the last paragraph of Section 159: but this can hardly be the intention. In England the rule is that "if the copy be an imperfect copy, or be not proved to be a correct copy, or if the witness has no independent recollection of the facts narrated therein, the original must be used;" *Doe v. Perkins*, 8 T. R., 749.—*Tayl.*, § 1409.

161. Any writing referred to under the provisions of the two last preceding sections must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

Right of adverse party as to writing used to refresh memory.

Note.

Adverse party may cross-examine witness upon document used to refresh memory.—It is to be observed that it is only when a document is used for purposes referred to in Section 159 and 160, that the adverse party has a right to see and cross-examine upon it; and, therefore, if a cross-examining counsel puts a paper into a witness' hands and asks him as to its general character or handwriting, the opposite party will not, on that account merely, be entitled to see it.

The English rule as to a document, used to refresh a witness' memory, is that the opposite party may inspect the document and cross-examine the witness on such entries as have been already referred to without putting in the document as part of his own evidence: but that if he goes further and ask questions as to other parts he makes it his own evidence.—*Tayl.*, § 1413. No such distinction appears to be maintained by the present law. If the document is used for the purposes mentioned, the witness may be cross-examined upon it.

"The grounds upon which the opposite party is permitted to inspect a writing and to refresh the memory of a witness are threefold; (i) to secure the full benefit of the witness on recollection as to the whole of the facts; (ii) to check the use of improper documents; and (iii) to

compare his oral testimony with his written statement;" he has a right to look at a writing with which a witness is refreshing his memory before or at the moment when the witness uses it, in order to refresh his memory in order to answer a particular question, but if he does not then exercise it he cannot retain it through the whole of the witnesses subsequent examination; *In re Thubboo Mahlon*, 1. L. R., 8 Cal., 789.

Production of documents.

162. A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court, notwithstanding any objection which there may be to its production or to its admissibility. The validity of any such objection shall be decided on by the Court.

The Court, if it sees fit, may inspect the document, unless it refers to matters of State, or take other evidence to enable it to determine on its admissibility.

Translation of documents.

If for such a purpose it is necessary to cause any document to be translated, the Court may, if it thinks fit, direct the translator to keep the contents secret, unless the document is to be given in evidence: and if the interpreter disobeys such direction, he shall be held to have committed an offence under Section 136 of the Indian Penal Code.

Note.

Section 123 makes the production of evidence as to unpublished official records of affairs of State entirely dependent upon the discretion of the Head of the Department concerned. It is therefore unnecessary for the Judge to have the right of inspecting any document of this character; but he may inspect a document which falls under Section 180 or 181 in order to judge of its admissibility. The person in custody of what he considers a privileged state document should bring it with him to Court, to be prepared for the Court deciding that it is not so: but there is no necessity, as in England, for him to state that he objects to the production on grounds of public policy; see *Kain v. Farre*, 37 L. T. Rep., N. S., 469. The Head of the Department can give or withhold his permission as he thinks fit, Section 123,

163. When a party calls for a document which he has given the other party notice to produce, and such document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so.

Giving as evidence, of document called for and produced on notice.

164. When a party refuses to produce a document which he has had notice to produce, he cannot afterwards use the document as evidence without the consent of the other party or the order of the Court.

Using, as evidence, of document production of which was refused on notice.

Illustration

A sues B on an agreement and gives B notice to produce it. At the trial, A calls for the document and B refuses to produce it. A gives secondary evidence of its contents. B seeks to produce the document itself to contradict the secondary evidence given by A, or in order to show that the agreement is not stamped. He cannot do so.

165. The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing: and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question.

Judge's power to put questions or order production.

Provided that the Judgment must be based upon facts declared by this Act to be relevant, and duly proved :

Provided also that this section shall not authorize any Judge to compel any witness to answer any

question, or to produce any document which such witness would be entitled to refuse to answer or produce under Sections 120 to 131 both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

Note.

Questions by Court.—The object of the questions which the Judge is here empowered to put is either to discover a relevant fact, or to obtain proper proof of it. There is, accordingly, no relaxation of the rules previously laid down as to relevancy. The section merely authorizes questions, the object of which is to ascertain whether the case is or is not proved in accordance with those rules.

Where a judge has called a witness in a criminal case the prisoner ought to be allowed to cross-examine him; in *re The Empress v. Grish Jhunder Talukdar*, I. L. R., 5 Cal., 614; *Gopal Lall Seal v. Manick Lall Seal*, I. L. R., 24 Cal., 288.

“When the counsel for the prisoner has examined or declined to cross-examine a witness, and the Court afterwards, and of its own motion, examined him, the witness cannot then, without the permission of the Court, be subjected to cross-examination. When, after the examination of a witness by the complainant and the defendant, the Court takes him in hand, he is put under special pressure, as the Judge is empowered to ask any question he pleases, in any form about any fact relevant or irrelevant; and he is, therefore, at the same time placed under the special protection of the Court, which may at its discretion, allow a party to cross-examine him; but this cannot be asked for as a matter of right. The principle applies equally, whether it is intended to direct the examination to the witness' statements of fact, or to circumstances touching his credibility; for any question meant to impair his credit tends (or is so designed) to get rid of the effect of all his answers, and of each of them, just as much as one that may bring out an inconsistency or contradiction. It is then a cross-examination upon answers—upon every answer given to the Court, and is subject to the Court's control;” *R. v. Sakhardam Mukundji*, 11 Bom. H. C. Rep., p. 166.

This section does not justify a Judge questioning the witnesses after the examination-in-chief and so anticipating the cross-examination; *R. v. Noor Bux Kazi*, I. L. R., 6 Cal., 279, at p. 288.

166. In cases tried by jury or with assessors, the jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

Power of jury or assessors to put questions.

CHAPTER XI.

OF IMPROPER ADMISSION AND REJECTION OF EVIDENCE.

167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court, before which such objection is raised, that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

No new trial for rejection or improper reception of evidence.

Note.

Improper rejection or reception of evidence.—The rule in England is that in civil cases no new trial shall be granted on the ground of improper admission or exclusion of evidence unless some substantial wrong or miscarriage has been occasioned thereby: in criminal cases there is no remedy unless there be a conviction and the Judge, in the exercise of his discretion states a case for the Court of Crown Cases Reserved; if, however, that Court is of opinion that evidence was improperly admitted or rejected, it must set aside the conviction. *Steph. Dig.*, § 143. The present section applies the same rule to all cases civil and criminal. This principle is acted upon by the Judicial Committee of the Privy Council. In *Lalla Bundseedhur v. The Government of Bengal*, 14 Moore's I. A., 86, the Courts below having admitted evidence not

properly admissible, the Judicial Committee examined the whole evidence, and being satisfied that, independent of the evidence improperly admitted, there was sufficient evidence to justify the decision of the Courts below, rejected the appeal. So also *Mohur Singh v. Ghariba*, 4 B. L. R., 499.

This section has the effect of curing any irregularity of procedure where it is shown that there has been no failure of justice or that the accused have not been substantially prejudiced; *Queen-Empress v. Nand Ram*, I. L. R., 9 All., 609.

Where a party has had full opportunity of producing his evidence, and part of it is rejected by an Appellate Court, the decision must, if the unrejected evidence is insufficient to support his case, be against him, not that the case be retried. "The suspicion, however probable, of the Judge that a party, who has failed to prove his case, may be more successful on a second and fuller investigation is no sufficient ground for directing a new trial;" *Kunwar Mitrasar Singh v. Nand Lal*, 8 Moore's I. A., 199.

No appeal on the sole ground that Lower Court discredited the witnesses:—An Appellate Court ought to be very cautious in overruling the conclusion come to by an Original Court as to the credibility of witnesses. The Original Court is in a far better position than the Appellate Court to form a sound opinion on this point, and its judgment on it should be accepted by the Appellate Court, unless it is manifestly clear from the probabilities attached to certain circumstances in the case that the Original Court was wrong; *Musadde Mahomed Cazum Sherazze v. Meerza Ally Mahomed Shoostry*, 6 Moore's I. A., 27. "This Board," it was observed in the Privy Council, "never heard of an appeal being instituted on the ground that witnesses had been discredited: the Court below were aware of the character of those witnesses, and, besides the knowledge of their character, had the advantage of seeing their demeanour and behaviour, of which we, on written evidence, have no power of judging. We feel it our duty, therefore, to decide this case on the general principle that no appeal will lie from the judgment of a Court below on the ground that the Court discredited the witnesses produced to them by either party;" *Santacana v. Ardevol*, 1 Knapp, 269.

This rule is equally applicable to criminal cases.—This section applies to criminal as well as to civil cases, *R. v. Huribolr Chunder Ghose*, I. L. R., 1 Cal., 207, and to criminal trials by jury in the High Court; *R. v. Naroji Daddbhui*, 9 Bom. H. C. Rep., p. 258.

Where no objection is taken by the opposite party to the production of evidence, it may be inferred that there are circumstances which

justify its production: and a party will not be allowed on appeal to urge an objection which he might have urged but did not urge at the original hearing. On this ground, where secondary evidence has been admitted, without objection, at the original hearing the other party cannot object to its admissibility on appeal. The admission of an unstamped or insufficiently stamped document has been held to be no ground for appeal, the error not affecting the merits of the case or the jurisdiction of the Court; *Mark Ridded Currie v. Mutu Numen Chetty*, 3 B. L. R., 180.

Where, in a suit for enhancement, the plaintiff called witnesses to speak from memory to prices prevalent in the locality for a number of years, and the Judge excluded their evidence and relied only on merchants' books, &c., this was held an error of law with which the Court could deal in special appeal; *Huro Prosad Roy v. Womataru Debrec*, I. L. R., 7 Cal., 267.

In *Womes Chunder Chatterjee v. Chunder Churn Roy*, I. L. R., 7 Cal., 295, Garth, C. J., points out the difficulty of applying this section in special appeal, as such a course would involve the necessity of weighing the remaining evidence, which, in special appeal, the Court cannot do. The only case where it can be done is where the Court has arrived at its conclusion on other grounds, independent of the evidence improperly admitted.

SCHEDULE.

Number and year.	Title.	Extent of repeal.
Stat. 26, Geo. III, c. 57 ...	For the further regulation of the trial of persons accused of certain offences committed in the East Indies; for repealing so much of an Act, made in the twenty-fourth year of the reign of His present Majesty (intituled. An Act for the better regulation and management of the affairs of the East India Company, and of the British possessions in India, and for establishing a Court of Judicature for the more speedy and effectual trial of persons accused of offences committed in the East Indies), as requires the servants of the East India Company to deliver inventories of their estates and effects; for rendering the laws more effectual against persons unlawfully resorting to the East Indies; and for the more easy proof, in certain cases, of deeds and writings executed in Great Britain or India.	Section 38 so far as it relates to Courts of Justice in the East Indies.
Stat. 14 & 15, Vic. c. 99 ...	To amend the Law of Evidence	Section 11 and so much of Section 19 as relates to British India.
Act XV of 1852.....	To amend the Law of Evidence	So much as has not been heretofore repealed.; Section 19.
Act XIX of 1853	To amend the Law of Evidence in the Civil Courts of the East India Company in the Bengal Presidency.	
Act II of 1855	For the further improvement of the Law of Evidence.....	So much as has not been heretofore repealed. Section 237.
Act XXV of 1861	For simplifying the procedure of the Courts of Criminal Judicature not established by Royal Charter.	
Act I of 1868.....	The General Clauses Act, 1868	Sections 7 & 8.

* Section 12 was preserved in force by Act XVIII of 1872, but both sections are repealed by the Indian Oaths' Act X of 1873.

APPENDIX I.

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Speech of the Hon'ble Mr. STEPHEN on presenting the report of the Select Committee on the Bill to define and amend the Law of Evidence.

(31st March 1871).

On this occasion, I have to explain the position of a measure perhaps as important as any that has been passed of late years by the Indian legislature, inasmuch as if it becomes law, it will affect the daily administration of both civil and criminal procedure throughout the whole country. Moreover, the subject-matter to which the Bill refers is one of deep and wide general interest, for a law of Evidence properly constructed would be nothing less than an application of the practical experience acquired in Courts of law to the problem of inquiring into the truth as to controverted questions of fact, however imperfectly it may have been attained.

"This is the object which has been kept in view in framing the Bill which the Committee append to their report, and which I am now to describe in a general way to your Lordship and the Council.

"I will state, in the first place, the history of the measure down to the present time. So far back as the year 1868, the Indian Law Commissioners drew a Draft Evidence Act, which was sent out to this country, and introduced and referred to a Select Committee by my friend and predecessor Mr. Maine. The Bill was circulated for opinion to the Local Governments, and was pronounced by every legal authority to which it was submitted to be unsuitable to the wants of this country. In this view the Committee concur for reasons which I need not state in detail on the present occasion, as they are fully stated in the report which I present to-day. I may observe in general, however, that the principal reasons were that the bill was not sufficiently elementary; that it was in several respects incomplete, and that, if it became law, it would not supersede the necessity under which judicial officers in this country are at present placed of acquainting themselves by means of English hand-books with English law upon this subject. The Commissioners' draft, indeed, would hardly be intelligible to a person who did not enter upon the study of it with

* Sir James Fitzjames Stephen, made a Judge of the High Court in England in January 1879.

a considerable knowledge of the English law. Under these circumstances, a new draft was framed, which we now propose to print and circulate, and on which I hope to receive the opinions of the Local Governments and High Courts in the course of the summer, say, by next September, so that their criticisms may be deliberately weighed, and the measure may be finally disposed of by this time next year.

“The report of the Committee explains, very fully the scheme of the Bill, which, of course, is of considerable, though not, I hope, unwieldy, length, and enters fully into the reasons which have led us to adopt its leading provisions. I will not weary the Council by going into all these questions on the present occasion. I will confine myself to saying that I trust that those who will have to criticise the Bill will begin by studying the report, which has been drawn up with great care, and which, as well as the Bill itself, forms a connected and systematic whole. The general object kept in view in framing the Bill has been to produce something from which a student might derive a clear, comprehensive and distinct knowledge of the subject, without unnecessary labour, but not, of course, without that degree of careful and sustained attention which is necessary in order to master any important and intricate matter. It is by this standard that the Committee in general, and I in particular as the member in charge of the Bill, desire that it may be tried.

“With this reference to the Bill and the Report of the Committee, I proceed to discuss the general questions connected with the subject, and to mention a few of the leading features of the measure.

“I suppose that I may assume as generally admitted the necessity which exists for legislation on the subject of evidence in British India. It would be exceedingly difficult to say precisely what, at the present moment, the law upon the subject certainly is. To some extent—it is far from being clear to what extent—and in some parts of the country—though questions might be raised as to the particular parts of the country—the English law of Evidence appears to be in force in British India. Whatever may be the theory, it both is and will continue to be so in practice; for if the English Law of Evidence has not been introduced into this country, English lawyers and quasi-lawyers have, and they have been directed to decide according to the law of justice, equity, and good conscience. Practically speaking, these attractive words mean little more than an imperfect understanding of imperfect collections of not very recent editions of English text-books. It is difficult to imagine anything much less satisfactory than such a state of the law as this. A good deal may be said for an elaborate legal system, well understood and strictly administered. A good deal may be said for unaided mother-wit and natural shrewdness; but a

half and half system, in which a vast body of half-understood law, totally destitute of arrangement and of uncertain authority, maintains a dead-alive existence, is a state of things which it is by no means easy to praise.

"Legislation thus being necessary, in what direction is legislation to proceed? A gentleman, for whose opinion upon all subjects connected with Indian law and legislation I, in common with most other people, have a profound respect, said to me the other day in discussing the subject: "my Evidence Bill would be a very short one. It would consist of one rule, to this effect—All rules of evidence are hereby abolished." I believe that the opinion thus vigorously expressed is really held by a large number of persons who would not avow it so plainly. There is, in short, in the lay world, including in the expression the majority of Indian civilians, an impression that rules of evidence are technicalities invented by lawyers principally for what Bentham called fee-gathering purposes, and of no real value in the investigation of truth. I cannot admit that this impression is in any degree correct. I believe that rules of evidence are of very great value in all inquiries into matters of fact, and in particular in inquiries for judicial purposes; and that it is practically impossible to investigate difficult subjects without regard to them.

"It is worth while to illustrate this point a little, because the necessity for rules of evidence rests upon it; but strong proof of it is to be found in the fact that in all ages and countries there have been rules of evidence. In rude times and amongst primitive people, the task of arriving at the truth as to matters of fact was regarded as so hopeless and difficult, that rude arbitrary substitutes for any sort of rational procedure were provided in the shape of ordeals and judicial combats. Where people began to obtain glimpses of the true methods of investigation, they seem to have considered as almost supernatural skill what in our days would fall within the scope of average police officers or attorneys' clerks. The delighted wonder which was displayed by the Jews, according to the apocryphal story of Susannah and the Elders, at what a legal friend of mine used to call 'that very feeble cross-examination of Daniel's about the trees,' is a good instance of this. At a later period, arbitrary rules of evidence began to be formed. Such a fact must be proved by two eye-witnesses; such another by four: such another by seven. To say nothing of European systems, in which such rules were in force, the Hedaya is full of them. These rules were never introduced in their full force into England, but the system which was adopted, or rather which grew up by degrees, was of a very mixed and exceedingly singular character. Part of it consisted of rules declaring large classes of witnesses to be incompetent. Part was intimately connected with the English system

of special pleading, which was so contrived as to define with extreme precision the facts upon which the parties differed, or were, as the phrase goes, at issue. Part were the result of the practical experience of the Courts, and these were by far the most valuable portion, in my opinion, of the English Law of Evidence. Most of the other rules have indeed been cut away by legislation, and the rules which still remain may fairly be taken to be the nett result of English judicial experience in modern times. In the most general terms, these rules are—

- 1, that evidence must be confined to the issue ;
- 2, that hearsay is no evidence ;
- 3, that the best evidence must be given ;
- 4, rules as to confessions and admissions ;
- 5, rules as to documentary evidence.

“ I have two general remarks to make upon them.

“ The first is that they are sound in substance and eminently useful in practice, and that, when properly understood, they are calculated to afford invaluable assistance to all who have to take part in the administration of justice.

“ The second is that I believe that no rules collected in one body upon any important subject were ever expressed so loosely, in such an intricate manner, or at such intolerable length.

“ It is necessary to prove the first of these propositions, in order to justify the recommendation of the Committee that the substance of the rules in question should be introduced in the form of express law into this country. It is necessary to prove the second proposition, in order to justify the attempt made in the Bill to reduce the rules to order and system.

“ First, then, as to the proposition that the rules in question are substantially sound, and do far more good than harm, even in their present confused condition. The proof of this is, I think, to be found in a comparison between the proceedings of English Courts of Justice and those of countries which have no such rules, and between the proceedings of English Courts in which these rules are, and those in which they are not, understood and acted upon. As a preliminary remark, I think I ought to observe that the knowledge of these rules possessed by English lawyers is derived far more from the daily practice in the Courts than from theoretical study. Many English lawyers know by habit, almost instinctively, whether this or that (to use the common phrase) is or is not evidence, although they have hardly given the theory of the matter a thought. Practice, therefore,

and not theory affords the true test of the value of these rules. In fact, the clumsy, intricate, ambiguous, and in many instances absurd, theory by which the rules of evidence are connected together came after the eminently sagacious practice which they were intended to justify and explain. What is the practical effect of these rules? I may perhaps be permitted to answer this by referring to a book which I published in 1863 on the criminal laws of England, and which contains, amongst other things, an analysis of several celebrated trials, English and French. One object of that analysis was to contrast the effect of the presence and absence of rules of evidence; and I think that anyone who would take the trouble to compare those trials together carefully would agree with me in the conclusion that the practical effect of the English rules of evidence in those cases was to shorten the proceedings enormously, and at the same time to consolidate and strengthen them, keeping out nothing that a reasonable person would have wished to have before him as materials for his judgment. The French system, on the other hand, which dispenses with all rules of evidence, got, at least in those cases, no other result from the want of them than floods of irrelevant gossip and collateral questions enough to confuse and bewilder the strongest head. Again, compare the proceedings of an ordinary Court of criminal justice with the proceedings of a court-martial, in which the rules of evidence are far less strictly enforced and less clearly understood. An ordinary criminal Court never gets very far from the point, but a court-martial continually wanders into questions far remote from those which it was assembled to try. Nothing, for instance, is more common than to see the prosecutor change places, as it were, with the prisoner, or to find collateral issues pursued till the Court finds itself engaged in determining, not whether A was guilty of a military offence, but whether Z told a falsehood on some perfectly irrelevant subject. In a case which I well recollect, B testified against A. B being cross-examined to his credit stated a fact not otherwise relevant to the enquiry. Z denied the fact which B affirmed, and made further statements which were contradicted by intermediate letters of the alphabet. No Judge can possibly be expected, by the mere light of nature, to know how to set limits to the enquiries in which he is engaged; yet if he does not, an incalculable waste of time and energy, and a great weakening of the authority of his Court, is sure to follow. Active and zealous advocates, who have no rules of evidence to restrain their zeal, would have it in their power to pervert the administration of justice to the basest purposes, and to inflict immense injury on every class connected with it, directly or remotely: that might, and often would, in such hands, be made the excuse for tearing open old quarrels and reviving

questions laid at rest, and giving fresh animus to scandals long since exploded; and the main question would frequently be lost sight of in a cloud of irritating and useless collateral issues. I may be excused for referring to my own experience at the Bar in illustration of this. Appeals against orders of affiliation used invariably to produce an amount of perjury and counter-perjury which I should think it would be difficult to exceed in any country. In certain parts of the country, it was a point of honour for the friends of the putative father and of the mother, respectively, to 'go to session to swear for him, or her,' as they used to say. No one who did not take part in such cases could imagine the strange ramifications of falsehood and contradiction into which a hotly-contested case of this kind would spread, or the number of imputations thrown on the honesty and chastity of the different witnesses, male and female. If it had not been for the rules of evidence the reputations of half the population of the village would have been torn in pieces. The rules of evidence kept matters to a point, and so minimized the evil; but the parties, the witnesses, and the attorneys, all appeared to me to be, one more anxious than another, to fight the matter out till the very last rag of character had been stripped off the back of every man, woman, and child, whose name was in any way brought into the discussion. The French Courts display this evil in an aggravated form. In the work to which I have already referred will be found an account of the trial of a monk named Leotade for murder. If disposed of under the English rules of evidence, it could hardly have taken more than a day or two at the most. In the French Court, it lasted for, I think, about three weeks, and branched out into all sorts of subjects. One witness, in particular, was discovered to have seduced a girl seven years before, and letters from her to him were read to throw light on his character. He naturally wished to give his own account of the transactions, but was stopped on the ground that a line must be drawn somewhere, and that the Court chose to draw it between the point at which an irrelevant slur had been thrown on his character and the point at which, had he been permitted to do so, he might have given an equally irrelevant explanation.

"It is not, however, merely for the purpose of confining judicial proceedings within reasonable limits that rules of evidence are, useful. They are also of pre-eminent importance for the purpose of protecting and guiding the Judge in the discharge of his duty. There is a sense in which it may be said with perfect truth that even legislative power is unequal to the task of abolishing rules of evidence. No doubt, it is competent to the legislature to provide that no rules of evidence shall have the force of law; but unless they expressly

forbid all Courts and Judges to act upon any rules at all, or to listen to any arguments as to the manner in which they shall exercise the discretion with which they are invested (propositions too absurd to state or to discuss), the Judges infallibly will hear, and will be guided by arguments upon the subject, and these arguments will be drawn from the practice of English Courts. Moreover, the Courts of Appeal will exercise their own discretion in the matter, and thus, by degrees, the system would grow up again in the most cumbrous, chaotic and inconvenient of all conceivable shapes. The plain truth is, that there is only one possible way of getting rid of the law of evidence, and that is by getting rid of the administration of justice by lawyers and returning to the system of mere personal discretion.

“It may be that some persons would like this policy, but I suppose it is one which I need not discuss.

“So far, I have considered the rules of evidence merely as they conduce to the important practical objects of keeping proceedings to the point, and of protecting and supporting the Judges. I must now say a few words on their value as furnishing the Judge with solid tests of truth. I fully admit that their value in this respect is often exaggerated and misconceived; but I think that, when the matter is fairly stated, it will be found that they have a real, though it may be described as a negative, value for this purpose. There are two great problems on which the rules of evidence throw no light at all, and on which they are not intended to throw any light; and it must be admitted that those problems are by far the most important of any which a Judge has to solve. No rule of evidence that ever was framed will assist a Judge in the very smallest degree in determining the master question of the whole subject—whether, and how far, he ought to believe what the witnesses say? Again, rules of evidence are not, and do not, profess to be rules of logic. They throw no light at all on a further question of equal importance to the one just stated. What inference ought the Judge to draw from the facts in which, after considering the statements made to him, he believes? In every judicial proceeding whatever, these two questions—Is this true, and, if it is true, what then?—ought to be constantly present to the mind of the Judge: and it must be admitted, both that the rules of evidence do not throw the smallest portion of light upon them and that persons who are absolutely ignorant of those rules may give a much better answer to each of these questions than men to whom every rule of evidence is perfectly familiar. I think that a more or less distinct perception of this, coupled with impatience of the exaggerated pretensions which have sometimes been made on behalf of the rules of evidence, are the principal reasons for the distrust and dislike with which they are at times regarded. This dislike, I think merely a

particular application of the vulgar error which in so many instances leads people to deprecate art in comparison with nature, as if there were an opposition between the two. and as if art in all cases did not presuppose and depend upon nature. The best shoes in the world will not make a man walk, nor will the best glasses make him see; and in just the same way, the best rules of evidence will not supply the place of natural sagacity or of a taste for and training in logic; but it no more follows that rules of evidence are useless as guides to truth, than that shoes or glasses are useless as assistances to the feet and to the eyes. The real use of rules of evidence in ascertaining the truth consists in the fact that they supply negative tests, warranted by very long and varied experience, as to two great points, the relevancy of facts to the question to be decided by the Court and the sort of evidence by which particular facts ought to be proved. They may in the broadest and most popular form be stated thus:—

“If you want to arrive at the truth as to any matter of fact of serious importance, observe the following maxims:—

“First, if your belief in the principal fact which you wish to ascertain is to be, after all, an inference from other facts, let these facts, at all events, be closely connected with the principal fact in some one of certain specific modes. Secondly, never believe in any fact whatever, whether it is the fact which you principally wish to determine, or whether it is a fact from which you propose to infer the existence of the principal fact, until you have before you the best evidence that is to be had; that is to say, if the fact is a thing done, have before you some one who saw it done with his own eyes: if it was a thing said, have before you some one who heard it said with his own ears: if it was a written paper, have the paper before you and read it for yourself. This exception—qualifications and explanations apart—is the true essence of the rules of evidence, and I think that no one will deny, either that these rules are in themselves eminently wise, or that they are by no means so obvious and self-evident that the mere unassisted natural sagacity of judicial officers of every grade can be trusted to grasp their full meaning and to apply them to the practical questions which arise in the administration of justice, with no assistance from any express law. I do not wish to exaggerate, but I must add, that I attach considerable moral and speculative value to these rules. If they are firmly grasped by Courts of Justice, and rigidly insisted upon in all practical matters which come before the Courts, they will gradually work their way amongst the people at large, and furnish them with tests by which to distinguish between credulity and rational belief upon a great variety of matters which will be of vast importance. I ought to add that the good which they are calculated to effect can be obtained only by erecting them into laws and rigorously enforcing them. When this is done,

I feel confident that experience will be continually adding to the proof of their value.

"So far, I have tried to prove the proposition that the English rules of evidence are of real solid value, and that they are not a mere collection of arbitrary subtleties which shackle, instead of guiding, natural sagacity. I pass now to the next proposition, which is, that these rules are expressed in a form so confused, intricate and lengthy, that it is hardly possible for any one to learn their true meaning otherwise than by practice, an inconvenience which may be altogether avoided by a careful and systematic distribution. For the proof of this proposition, if indeed it is disputed, I can only refer in general to the English text-books on the subject. They form a mass of confusion which no one can understand until, by the aid of long practice, he learns the intention of the different rules, of which they heap together innumerable and often incoherent illustrations. I am far from wishing to impute this as a fault to the industrious, and in many cases distinguished, authors of these compilations. They, like all other hand-books, are intended for immediate practical purposes, and are mere collections of enormous masses of isolated rulings, generally relating to some very minute point. It was necessary, therefore, that they should be arranged, rather with reference to vague catch-words with which the ears of lawyers are familiar, than with reference to theoretical principles which it has never been worth any lawyer's while to investigate.

"The condition of the law of evidence, as well as the condition of many other branches of the law of England, affords continual illustrations of the extraordinary intricacy and difficulty which arises from the combination of the very greatest practical sagacity with an absence of sound theory, or, what is still worse, with the presence of unsound theory. No one who has not seen it could possibly imagine how obscure the meaning of a clever man may become when he is forced to squeeze it into the terms of a theory which does not fit it and is not true. I will give one or two illustrations of my meaning. The expression 'hearsay is no evidence' early obtained considerable currency in the English Courts. In a general way, its meaning is clear enough, and, what is more, is true; but, when considered as the scientific expression of a general truth, from which rules can be deduced in particular cases, it is inaccurate, faulty and obscure to the last degree. The objections to it are, that both 'Hearsay' and 'Evidence' are words of the most uncertain kind, each of which may mean several different things. For instance, hearsay may mean what you have heard a man say, and this is its most obvious meaning; but it is difficult to imagine a grosser absurdity than the assertion that no one is ever to prove, in a judicial proceeding, anything said by any

other person. 'Hearsay,' again, may be taken to mean that which a person did not perceive with his own organs of perception; but this is not the natural sense of the word, and it is almost impossible in practice to divest a word of its natural meaning.

"The word 'evidence' is also exceedingly ambiguous. It may mean that which a witness says in Court. It may mean the facts to which he testifies, regarded as a groundwork for further inference.

"Notwithstanding this, the phrase 'hearsay is no evidence,' being emphatic and easy to recollect, stuck in the ears and in the minds of lawyers, and has been taken by many text-writers as the principle on which their statement of the most important branch of the law should be arranged. They accordingly took to describing as hearsay every fact of which evidence was by law excluded; in short, they turned 'hearsay is no evidence' into 'that which is not evidence is hearsay.' They did not, however, do this expressly; they did it by describing as exceptions to the rule excluding hearsay all cases in which evidence was admitted of anything which would have been excluded but for such exceptions. This is so intricate a statement that I can hardly expect the Council to follow me, but I will give an illustration of what I mean. The question is, whether a piece of land belongs to A or B. A says that it belongs to him, because his father C bought it from D, who bought it from E, and he produces the deeds by which E conveyed the land to D and D conveyed it to C. Now, as D and E are not parties to the suit between A and B, and as A cannot of his own knowledge know anything of the transaction between them, English text-writers call the deed between D and E 'hearsay'; and, according to Mr. Pitt Taylor, the rule which permits such deeds to be given in evidence is the third exception to the rule which excludes hearsay. One of the Judges, if I am not mistaken, called such evidence 'written hearsay,' and so indifferent are English lawyers in general to the abuse of language for the sake of momentary convenience that it probably never struck him that this was a contradiction in terms. I think, however, that it is hard to expect people to understand, bear in mind, and follow out in all its ramifications a system which employs language in such a peculiar manner as to call ancient deeds 'written hearsay.' To talk of hearing a document is like talking of seeing a sound.

"I now turn to the ambiguity of the word 'evidence,' to which I have already referred. As I have just said, 'evidence' sometimes means a fact which suggests an inference. For instance, it is common to say,—'Recent possession of stolen goods is evidence of theft;' that is, the fact of such possession suggests the inference of theft. At other times, and I think more frequently, 'evidence' means what a witness actually says in Court, or that which he produces. For

instance, we say the evidence which he gave was true. I might occupy, I will not say the attention, but the time, of your Lordship, and the Council for hours if I were to attempt to describe the amount of confusion and obscurity which the neglect of this simple and obvious distinction has thrown over the whole subject. I will content myself with observing that it produces the effect of giving a double meaning to every expression into which the word 'evidence,' is introduced. 'Circumstantial evidence,' 'hearsay evidence,' 'direct evidence,' 'primary evidence,' 'best evidence,' have each two sets of meanings, and the result is, that it is almost impossible to arrive at a clear and comprehensive knowledge of the whole subject, or see how its various parts are related to each other, without an amount of study, thought, and practical acquaintance with the actual working of the rules of evidence which few people are in a position to bestow upon the subject.

"I may appear to be detaining the Council unduly upon merely verbal questions, but I think that it is a common fault to underrate the importance of accurate language, particularly in regard to the fundamental terms of any particular branch of knowledge. In regard to law, I have not the least doubt that a very large proportion of the intricacy and difficulty which attach to it is due to the fact that proper pains have never been bestowed on the definition of its fundamental terms. What could be made of Euclid if we were not quite sure of our meaning when we spoke of a point, a line, a circle, parallels, and perpendiculars? such a defect would render Geometry impossible, and the defect which makes large parts of the law almost unintelligible, and beyond all measure cumbrous and unwieldy, is precisely analogous to it in principle. I believe that, if its fundamental terms were defined as clearly as the term 'law' was defined by the late Mr. Austin, the study of law would become comparatively easy, and in many cases attractive for its own sake; that its bulk might be diminished to a degree of which people in general have hardly any conception; that the expense of its administration might be greatly diminished, and that comparative certainty might do away with a very large amount of needless and harassing litigation.

"I shall now proceed to describe, shortly, the principles on which the Draft Bill of the Committee has been framed. In the first place, we thought it necessary to fix the sense in which the fundamental terms of the subject should be understood, and for that purpose we define 'fact,' 'evidence,' 'proof,' 'proved,' and some others as to which I will content myself with a reference to the report. It seemed to us that the remainder of the subject would fall under the following general heads:—

- 1.—The relevancy of fact to the issues to be proved.

- 2.—The proof of facts, according to their nature, by oral, documentary, or material evidence.
- 3.—The production of evidence in Court.
- 4.—The duties of the Court, and the effect of mistaken admission or rejection of evidence.

“These heads would, we think, be found to embrace, and to arrange in their natural order, all the subjects treated of by English text-writers and Judges under the general head of the Law of Evidence. I will say a few words on their relation to each other, and of each of them in turn.

“The main feature of the Bill consists in the distinction drawn by it between the relevancy of facts and the mode of proving relevant facts. The neglect of this distinction by English text-writers, no doubt, arises from the ambiguity of the word ‘evidence,’ to which I have already referred, and is the main cause of the extreme difficulty of understanding the English law of evidence systematically. I will shortly illustrate my meaning. A says, ‘Z committed murder.’ First of all, this is a fact—something which could be directly perceived by the sense of hearing and distinctly remembered afterwards. Now, whether this fact is or is not relevant in a particular case depends upon a variety of circumstances. If the question is, whether A was guilty of defaming Z by accusing him of murder; or whether Z had a motive for assaulting A, because A said that he had committed murder: or if Z is accused of murder, and the object is to show that, when A charged him with it, he behaved as if he were guilty, and in many other instances which might be put, the fact that A spoke those words is clearly relevant. But if the question is, whether Z actually did commit murder, the fact that A thought so or said so, generally speaking, is not relevant. Supposing, however, that the fact is relevant on some one of the grounds just mentioned, or on any other ground, whatever be the ground on which the words are relevant to the matter under inquiry, it is obvious that the words themselves ought to be satisfactorily proved, and the rule of English law—and we think it is a wise rule—is that they must be proved by the assertion of some witness that he heard them said with his own ears. English text-writers throw together these two classes of rules under the head of Hearsay. They lay down the general rule that hearsay is no evidence, meaning by it that certain classes of facts called hearsay are to be treated as irrelevant to the determination of particular questions, and it is necessary to look through a long list of exceptions to that rule in order to see whether, in a particular case, A’s statement may or may not be proved. If you find that it can be proved, the question is, how can it be proved? and you

propose to prove it by a witness who says that B told him that he heard A say so. Again, you are told, 'hearsay is no evidence'; but this time the expression means, not that the fact is irrelevant, but that the testimony by which it is proposed to prove the fact is improper. One extreme inconvenience of this is that the most important part of the English law of evidence is thrown into the most intricate and inconvenient of all possible forms, that of a very wide negative, of most uncertain meaning, qualified by a long string of exceedingly intricate exceptions.

"No one who has not gone through the process of learning the law by mere rule-of-thumb practice can imagine the degree of needless obscurity and difficulty upon this point, of the existence of which he becomes gradually conscious. It would be perfectly fair to say to almost any English text-writer, 'you tell me, at enormous length, what is not evidence; but you nowhere tell me what is evidence, except, indeed, in large compilations, which point out what has to be proved upon particular issues, and which it is as impossible to read or remember, as it is to read or remember any other mere works of reference.'

"I hope that we have been able to avoid this, and that the second chapter of the Bill will be found to state specifically, and in a positive form, what sorts of facts are relevant, as being sufficiently connected with the facts in issue to afford grounds for an inference as to their existence or non-existence. I will not weary the Council by mentioning those rules, and I will content myself by referring to the Bill and to the report. But I may shortly illustrate them by reference to a passage from a modern historian, which will relieve the dullness of a very technical speech. The passage to which I refer is a short summary, by Mr. Froude, of the grounds on which he believes that Mary, Queen of Scots, murdered her husband.

"As Mr. Froude is not a lawyer, he certainly wrote what I am about to read without reference to rules of evidence. I think the fact that he did, in fact, unconsciously observe them illustrates very strongly the truth of my assertion that they are no more than the result of experience and practical sagacity thrown into a categorical shape. I need hardly say that I use the passage merely as an illustration, and without any notion of adopting Mr. Froude's opinions, or asserting the truth of his facts. I am concerned merely with their relevance.

"She (Mary) was known to have been weary of her husband, and anxious to get rid of him.'

"(By our draft, facts which show motive are relevant.)

“ The difficulty and the means of disposing of him had been discussed in her presence, and she had herself suggested to Sir James Balfour to kill him.”

“(Facts which show preparation for a fact in issue are relevant.)

“ She brought him to the house where he was destroyed; she was with him two hours before his death;”

“(Facts so connected with the facts in issue as to form part of the same transaction are relevant.)

“ and afterwards threw every difficulty in the way of any examination into the circumstances of his end.”

“(Subsequent conduct influenced by any fact in issue is relevant.)

“ The Earl of Bothwell was publicly accused of the murder.”

“(Facts necessary to be known in order to introduce relevant facts are relevant.)

“ She kept him close at her side; she would not allow him to be arrested; she went openly to Seton with him before her widowhood was a fortnight old. When at last, unwillingly, she consented to his trial, Edinburgh was occupied by his retainers. He presented himself at the Tolbooth surrounded by the Royal Guard, and the charge fell to the ground, because the Crown did not prosecute and the Earl of Lennox had been prevented from appearing.”

“(Subsequent conduct influenced by any fact in issue is relevant.)

“ A few weeks later, she married Bothwell, though he had a wife already, and when her subjects rose in arms against her and took her prisoner, she refused to allow herself to be divorced from him.

“(Subsequent conduct. Motive.)

“ A large part of the evidence consisted of certain letters which the Queen was said to have written. Mr. Froude, in passages which I need not read, alleges facts which go to show that she tried to prevent the production, and to secure the destruction, of these letters. An illustration as to subsequent conduct meets the case of a person who destroys or conceals evidence.

“ Finally, Mr. Froude observes: ‘ In her own correspondence, though she denies the crime, there is nowhere the clear ring of innocence which makes its weight felt even when the evidence is weak which supports the words.’

“ The letters would be evidence under the section relating to admissions, and Mr. Froude’s remark is in the nature of a criticism on them by a prosecuting Counsel.

"In English text-books, so far as my experience goes, these rules and others of the same sort are nowhere presented in a compact substantive form. They come in, for the most part, as exceptions to the rule that evidence must be confined to the points in issue. In fact, they can be learned only by the practice of the Courts, though they are as natural and lax as any rules need be if they are properly stated.

"From the rules which state what facts may be proved, we pass to those which prescribe the manner in which a relevant fact must be proved. Passing over technical matters—such as the law relating to judicial notice, questions relating to public documents, and the like—these rules may be said to be three in number, though, of course, numerous introductory rules are required to be adopted for practice. They are these—

"1. If a fact is proved by oral evidence, it must be direct; that is to say, things seen must be deposed to by some one who says he saw them with his own eyes. Things heard by some one who says he heard them with his own ears.

"2. Original documents must be produced or accounted for before any other evidence can be given of their contents.

"3. When a contract has been reduced to writing, it must not be varied by oral evidence.

"These rules, as I have said, are subject to certain exceptions, and require certain practical adjustments; but I do not think that any one who has had practical experience of the working of courts of justice will deny their substantial soundness, or indeed the absolute practical necessity for enforcing them.

"Passing over certain matters which are explained at length in the Bill and report, I come to two matters to which the Committee attach the greatest importance as having peculiar reference to the administration of justice in India. The first of these rules refers to the part taken by the Judge in the examination of witnesses; the second to the effect of the improper admission or rejection of evidence upon the proceedings in case of appeal.

"That part of the law of evidence which relates to the manner in which witnesses are to be examined assumes the existence of a well-educated Bar, co-operating with the Judge and relieving him practically of every other duty than that of deciding questions which may arise between them. I need hardly say that this state of things does not exist in India, and that it would be a great mistake to legislate as if it did. In a great number of cases—probably the vast numerical majority—the Judge has to conduct the whole trial himself. In all

cases he has to represent the interests of the public much more distinctly than he does in England. In many cases he has to get at the truth, or as near to it as he can, by the aid of collateral inquiries which may incidentally tend to something relevant; and it is most unlikely that he should ever wish to push an inquiry needlessly, or to go into matters not really connected with it. We have accordingly thought it right to arm Judges with a general power to ask any questions, upon any facts, of any witnesses, at any stage of the proceedings irrespectively of the rules of evidence binding on the parties and their agents, and we have inserted in the Bill a distinct declaration that it is the duty of the Judge, especially in criminal cases, not merely to listen to the evidence put before him, but to inquire to the utmost into the truth of the matter. We do not think that the English theories, that the public have no interest in arriving at the truth, and that even criminal proceedings ought to be regarded mainly in the light of private questions between the prosecutor and the prisoner, are at all suited to India, if indeed they are the result of anything better than carelessness and apathy in England.

"With respect to the question of appeals, we have drawn a series of provisions, the object of which is to prevent mere mistakes in procedure from destroying the value of work properly done, as far as it goes. We have gone through the various cases in which, as appears to us, the question of the improper admission or rejection or omission of evidence can arise; and have provided that, whenever any Appellate Court discovers the occurrence of any mistake, it shall not reverse the decision of the inferior Court, but shall either strike out what is redundant, or supply what is defective, as the case may be, and give judgment accordingly."

APPENDIX II.

LIABILITY TO DAMAGES FOR REFUSING TO GIVE EVIDENCE.

ACT 19 OF 1853, SECTION 26.

Liability to damages for refusing to give evidence. See Sec. 132.

26. Any person, whether a party to the suit or not, to whom a summons to attend and give evidence or produce a document, shall be personally delivered, and who shall, without lawful excuse, neglect or refuse to obey such summons, or who shall be proved to have absconded, or kept out of the way to avoid being served with such summons, and any person who, being in Court and upon being required by the Court to give evidence, or produce a document in his possession, shall, without lawful excuse, refuse to give evidence, or sign his deposition, or to produce a document in his possession, shall, in addition to any

or to produce a document in his possession, shall, in addition to any proceedings under this Act, be liable to the party at whose request the summons shall have been issued, or at whose instance he shall be required to give evidence, or produce the document, for all damages which he may sustain in consequence of such neglect, or refusal, or of such absconding, or keeping out of the way as aforesaid, to be recovered in a civil action.

19 & 20 Vic. CAP. 113.

An Act to provide for taking evidence in Her Majesty's dominions in relation to Civil and Commercial matters pending before foreign tribunals.

(29th July 1856.)

WHEREAS it is expedient that facilities be afforded for taking evidence in Her Majesty's dominions in relation to Civil and Commercial matters pending before foreign tribunals: Be it enacted, as follows:

1. Where, upon an application for this purpose, it is made to appear to any Court or Judge having authority under this Act, that any Court or tribunal of competent jurisdiction in a foreign country, before which any Civil or Commercial matter is pending, is desirous of obtaining the testimony in relation to such matter of any witness or witnesses within the jurisdiction of such first mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the examination upon oath, upon interrogatories or otherwise, before any person or persons named in such order, of such witness or witnesses accordingly; and it shall be lawful for the said Court or Judge, by the same order, or for such Court or Judge, or any other Judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced in like manner as an order made by such Court or Judge in a cause depending in such Court or before such Judge.

Order for examination of witnesses in this country in relation to any Civil or Commercial matter pending before a foreign tribunal.

2. A certificate under the hand of the ambassador, minister, or other diplomatic Agent of any foreign power received as such by Her Majesty, or in case there be no such diplomatic Agent, then of the Consul-General or Consul of any such foreign power at London, received and admitted as such by Her Majesty, that any matter in relation to which an application is made under this Act is a Civil or Commercial matter pending before a Court or tribunal in the country of which he is the diplomatic Agent or Consul having jurisdiction in

Certificate of ambassador, &c., sufficient evidence in support of application.

the matter so pending, and that such Court or tribunal is desirous of obtaining the testimony of the witness or witnesses to whom the application relates, shall be evidence of the matters so certified; but where no such certificate is produced other evidence to that effect shall be admissible.

Examination
of witnesses to
be taken upon
oath.

8. It shall be lawful for every person authorized to take the examination of witnesses by any order made in pursuance of this Act to take all such examinations upon the oath of the witnesses, or affirmation in cases where affirmation is allowed by law instead of oath, to be administered by the person so authorized: and if upon such oath or affirmation any person making the same wilfully and corruptly give any false evidence, every person, so offending shall be deemed and taken to be guilty of perjury.

Person giving
false evidence
guilty of per-
jury.

Payment of
expenses.

4. Provided always, that every person whose attendance shall be so required shall be entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial.

Persons to
have right of
refusal to an-
swer questions
and to produce
documents.

5. Provided also, that every person examined under any order made under this Act shall have the like right to refuse to answer questions tending to criminate himself, and other questions, which a witness in any cause pending in the Court by which or by a Judge whereof or before the Judge by whom the order for examination was made would be entitled to; and that no person shall be compelled to produce under any such order as aforesaid any writing or other document that he would not be compelled to produce at a trial of such a cause.

Certain Courts
and Judges to
have authority
under this Act.

6. Her Majesty's Superior Courts of Common Law at Westminster and in Dublin respectively, the Court of Session in Scotland, and any Supreme Court in any of Her Majesty's Colonies or possession abroad, and any Judge of any such Court, and every Judge in any such Colony or possession who by any order of Her Majesty in Council, may be appointed for this purpose, shall respectively be Courts and Judges having authority under this Act.

22 VIC. CAP. 20. EVIDENCE BY COMMISSION ACT, 1859.

An Act to provide for taking evidence in Suits and Proceedings pending before tribunals in Her Majesty's dominions in places out of the jurisdiction of such tribunal. The provisions of this Act apply to proceedings under the Evidence by Commission Act, 1855, 48 & 49 Vic. c. 74. See Sec. 4 of the Act.

(19th April 1859.)

Preamble.

WHEREAS it is expedient that facilities be afforded for taking evidence in or in relation to Actions, Suits, and Proceedings pending before

tribunals in Her Majesty's dominions in places in such dominions out of the jurisdiction of such tribunals: Be it enacted, as follows:

1. Where, upon an application for this purpose, it is made to appear to any Court or Judge having authority under this Act, that any Court or tribunal of competent jurisdiction in Her Majesty's dominions has duly authorized, by commission, order, or other process, the obtaining the testimony, in or in relation to any Action, Suit, or Proceeding pending in or before such Court or tribunal, of any witness or witnesses out of the jurisdiction of such Court or tribunal, and within the jurisdiction of such first mentioned Court, or of the Court to which such Judge belongs, or of such Judge, it shall be lawful for such Court or Judge to order the examination before the person or persons appointed, and in manner and form directed by such Commission, order, or other process as aforesaid, of such witness or witnesses accordingly; and it shall be lawful for the said Court or Judge, by the same order, or for such Court or Judge or any other Judge having authority under this Act, by any subsequent order, to command the attendance of any person to be named in such order, for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just; and any such order may be enforced, and any disobedience thereof punished, in like manner as in case of an order made by such Court or Judge in a cause depending in such Court or before such Judge.

Order for examination to witnesses out of the jurisdiction in relation to any suit pending before any tribunal in Her Majesty's possessions.

2. Every person examined as a witness under any such commission, order, or other process as aforesaid, who shall upon such examination wilfully and corruptly give any false evidence, shall be deemed and taken to be guilty of perjury.

Penalty on persons giving false evidence.

3. Provided always, that every person whose attendance shall be so ordered shall be entitled to the like conduct money, and payment for expenses and loss of time, as upon attendance at a trial.

Payment of expenses.

4. Provided also, that every person examined under any such commission, order or other process as aforesaid, shall have the like right to refuse to answer questions tending to criminate himself, and other questions which a witness in any cause pending in the Court by which, or by a Judge whereof, or before the Judge by whom the order for examination was made, would be entitled to, and that no person shall be compelled to produce under any such order as aforesaid any writing or other document that he would not be compellable to produce at a trial of such a cause.

Power to person to refuse to answer questions to criminate himself, or to produce documents.

Certain
Courts and
Judges to have
authority under
this Act.

5. Her Majesty's Superior Courts of Common Law at Westminster and in Dublin respectively, the Court of Session in Scotland, and any Supreme Court in any of Her Majesty's Colonies or possessions abroad, and any Judge of any such Court, and every Judge in any such Colony or possession who, by any order of Her Majesty in Council, may be appointed for this purpose, shall respectively be Courts and Judges having authority under this Act.

6. It shall be lawful for the Lord Chancellor of Great Britain, with the assistance of two of the Judges of the Courts of Common Law at Westminster, so far as relates to England, and for the Lord Chancellor of Ireland, with the assistance of two of the Judges of the Courts of Common Law at Dublin, so far as relates to Ireland, and for two of the Judges of the Court of Session, so far as relates to Scotland, and for the Chief or only Judge of the Supreme Court in any of Her Majesty's Colonies or possessions abroad, so far as relates to such Colony or possession, to frame such rules and orders as shall be necessary or proper for giving effect to the provisions of this Act and regulating the procedure under the same.

48 & 49 VIC. CAP. 74. EVIDENCE BY COMMISSION ACT, 1885.

An Act to amend the Law relating to taking Evidence by Commission in India and the Colonies, and elsewhere in Her Majesty's Dominions.

(14th August 1885.)

BE it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

Short title.

1. This Act may be cited as the Evidence by Commission Act, 1885.

Power to
Court to
nominate ex-
aminer in civil
proceedings.

2. Where in any civil proceeding in any Court of competent jurisdiction an order for the examination of any witness or person has been made, and a commission, mandamus, order, or request for the examination of such witness or person is addressed to any Court, or to any Judge of a Court, in India or the Colonies, or elsewhere in Her Majesty's dominions, beyond the jurisdiction of the Court ordering the examination, it shall be lawful for such Court, or the Chief Judge thereof, or such Judge, to nominate some fit person to take such

* See Section 5 of the Evidence by Commission Act, 1865, 45 & 49 Vic. c. 74. *post.*

examination, and any deposition or examination taken before an examiner so nominated shall be admissible in evidence to the same extent as if it had been taken by or before such Court or Judge.

3. Where in any criminal proceedings a mandamus or order for the examination of any witness or person is addressed to any Court, or to any Judge of a Court, in India or the Colonies, or elsewhere in Her Majesty's dominions, beyond the jurisdiction of the Court ordering the examination, it shall be lawful for such Court, or the Chief Judge thereof, or such Judge, to nominate any Judge of such Court, or any Judge of an inferior Court, or Magistrate within the jurisdiction of such first-mentioned Court, to take the examination of such witness or person, and any deposition or examination so taken shall be admissible in evidence to the same extent as if it had been taken by or before the Court or Judge to whom the mandamus or order was addressed.

Power in criminal proceedings to nominate Judge or Magistrate to take depositions.

4. The provisions of the Act passed in the twenty-second year of Her Majesty, chapter twenty, intituled "An Act to provide for taking evidence in suits and proceedings pending before tribunals in Her Majesty's dominions in places out of the jurisdiction of such tribunals" (which may be cited as the Evidence by Commission Act, 1859), as amended by this Act, shall apply to proceedings under this Act.

Application of 22 Vic. c. 20, as to conduct money, &c., to proceedings under this Act.

5. The power to make rules conferred by section six of the Evidence by Commission Act, 1859, shall be deemed to include a power to make rules with regard to all costs of or incidental to the examination of any witness or person, including the remuneration of the examiner, if any, whether the examination be ordered pursuant to that Act or under this or any other Act for the time being in force relating to the examination of witnesses beyond the jurisdiction of the Court ordering the examination.

Amendment of 22 Vic. c. 20, as to costs.

6. When pursuant to any such commission, mandamus, order, or request as in this Act referred to any witness or person is to be examined in any place beyond the jurisdiction of the Court ordering the examination, such witness or person may be examined on oath, affirmation, or otherwise, according to the law in force in the place where the examination is taken, and any deposition or examination so taken shall be as effectual for all purposes as if the witness or person had been examined on oath before a person duly authorized to administer an oath in the Court, ordering the examination.

Oath or affirmation of witness.

22 & 23 VIC. CAP. 63.

An Act to afford facilities for the more certain ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof.

(13th August 1859.)

Preamble

WHEREAS great improvement in the administration of the law would ensue if facilities were afforded for more certainly ascertaining the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof: Be it therefore enacted as follows :

— Courts in one part of Her Majesty's dominions may remit a case for the opinion in law of a Court in any other part thereof.

1. If, in any action depending in any Court within Her Majesty's dominions, it shall be the opinion of such Court, that it is necessary or expedient, for the proper disposal of such action, to ascertain the law applicable to the facts of the case as administered in any other part of Her Majesty's dominions on any point on which the law of such other part of Her Majesty's dominions is different from that in which the Court is situate, it shall be competent to the Court in which such action may depend to direct a case to be prepared setting forth the facts as these may be ascertained by verdict of a Jury or other mode competent, or as may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the Court for that purpose in the event of the parties not agreeing; and upon such case being approved of by such Court or a Judge thereof, they shall settle the questions of law arising out of the same on which they desire to have the opinion of another Court, and shall pronounce an order remitting the same, together with the case, to the Court in such other part of Her Majesty's dominions, being one of the Superior Courts thereof, whose opinion is desired upon the law administered by them as applicable to the facts set forth in such case, and desiring them to pronounce their opinion on the questions submitted to them in the terms of the Act; and it shall be competent to any of the parties to the action to present a petition to the Court whose opinion is to be obtained, praying such last mentioned Court to hear parties or their counsel, and to pronounce their opinion thereon in the terms of this Act, or to pronounce their opinion without hearing parties or counsel; and the Court to which such petition shall be presented, shall, if they think fit, appoint an early day for hearing parties or their counsel on such case, and shall thereafter pronounce their opinion upon the questions of law as administered by them which are submitted to them by the Court; and in order to their pronouncing such opinion they shall be entitled to take such further procedure thereupon as to them shall seem proper.

2. Upon such opinion being pronounced, a copy thereof, certified by an officer of such Court, shall be given to each of the parties to the action by whom the same shall be required, and shall be deemed and held to contain a correct record of such opinion.

Opinion to be authenticated and certified copy given.

3. It shall be competent to any of the parties to the action, after having obtained such certified copy of such opinion, to lodge the same with an officer of the Court in which the action may be depending, who may have the official charge thereof, together with a notice of motion, setting forth that the party will, on a certain day named in such notice, move the Court to apply the opinion contained in such certified copy thereof to the facts set forth in the case hereinbefore specified, and the said Court shall thereupon apply such opinion to such facts, in the same manner as if the same had been pronounced by such Court itself upon a case reserved for opinion of the Court, or upon special verdict of a Jury; or the said last mentioned Court shall, if it think fit, when the said opinion has been obtained before trial, order such opinion to be submitted to the Jury with the other facts of the case as evidence, or conclusive evidence as the Court may think fit, of the foreign law therein stated, and the said opinion shall be so submitted to the Jury.

Opinion to be applied by the Court making the remit

4. In the event of an appeal to Her Majesty in Council or to the House of Lords in any such action, it shall be competent to bring under review of Her Majesty in Council or of the House of Lords the opinion pronounced as aforesaid by any Court whose judgments are reviewable by Her Majesty in Council or by the House of Lords, and Her Majesty in Council or that House may respectively adopt or reject such opinion of any Court whose judgments are respectively reviewable by them as the same shall appear to them to be well founded or not in law.

Her Majesty in Council or House of Lords on appeal may adopt or reject opinion.

5. In the construction of this Act, the word "action" shall include every judicial proceeding instituted in any Court, Civil, Criminal or Ecclesiastical; and the words "Superior Courts" shall include, in England, the Superior Courts of Law at Westminster, the Lord Chancellor, the Lords Justices, the Master of the Rolls, or any Vice-Chancellor, the Judge of the Court of Admiralty, the Judge Ordinary of the Court for Divorce and Matrimonial Causes, and the Judge of the Court of Probate; in Scotland, the High Courts of Judiciary, and the Court of Session, acting by either of its divisions; in Ireland, the Superior Courts of law at Dublin, the Master of the Rolls and the Judge of Admiralty Court and in any other part of Her Majesty's dominions, the Superior Courts of Law or Equity therein.

Interpretation of terms.

24 VIC. CAP. II.

An Act to afford facilities for the better ascertainment of the law of foreign countries when pleaded in Courts within Her Majesty's dominions.

(17th May 1861.)

Preamble 22
& 23 Vic. c.
63.

WHEREAS an Act was passed in the twenty-second and twenty-third years of Her Majesty's reign, intituled an Act to afford facilities for the more certain ascertainment of the law administered in one part of Her Majesty's dominions when pleaded in the Courts of another part thereof. And whereas it is expedient to afford the like facilities for the better ascertainment, in similar circumstances, of the law of any foreign country or State with the Government of which Her Majesty may be pleased to enter into a convention for the purpose of mutually ascertaining the law of such foreign country or State when pleaded in actions depending in any Courts within Her Majesty's dominions and the law as administered in any part of Her Majesty's dominions when pleaded in actions depending in the Courts of such foreign country or State: Be it therefore enacted, as follows, viz:—

Superior Courts within Her Majesty's dominions may remit a case, with queries to a Court of any foreign State within which Her Majesty may have made a convention for that purpose, for ascertainment of law of such State.

1. If, in any action depending in any of the Superior Courts within Her Majesty's dominions, it shall be the opinion of such Court, that it is necessary or expedient, for the disposal of such action, to ascertain the law applicable to the facts of the case as administered in any foreign State or country with the Government of which Her Majesty shall have entered into such convention as aforesaid, it shall be competent to the Court in which such action may depend to direct a case to be prepared setting forth the facts as these may be ascertained by verdict of a Jury or other mode competent, or as may be agreed upon by the parties, or settled by such person or persons as may have been appointed by the Court for that purpose in the event of the parties not agreeing; and upon such case being approved of by such Court or a Judge thereof, such Court or Judge shall settle the questions of law arising out of the same on which they desire to have the opinion of another Court, and shall pronounce an order remitting the same, together with the case, to such Superior Court in such foreign State or country as shall be agreed upon in said convention, whose opinion is desired upon the law administered by such foreign Court as applicable to the facts set forth in such case, and requesting them to pronounce their opinion on the question submitted to them; and upon such opinion being pronounced, a copy thereof certified by an officer of such Court, shall be deemed and held to contain a correct record of such opinion,

2. It shall be competent to any of the parties to the action, after having obtained such certified copy of such opinion, to lodge the same with the officer of the Court within Her Majesty's dominions in which the action may be depending, who may have the official charge thereof, together with a notice of motion, setting forth that the party will, on a certain day named in such notice, move the Court to apply the opinion contained in such certified copy thereof to the facts set forth in the case hereinbefore specified, and the said Court shall thereupon, if it shall see fit, apply such opinion to such facts, in the same manner as if the same had been pronounced by such Court itself upon a case reserved for opinion of the Court, or upon special verdict of a Jury; or the said last mentioned Court shall, if it think fit, when the said opinion has been obtained before trial, order such opinion to be submitted to the Jury with the other facts of the case as conclusive evidence of the foreign law therein stated, and the said opinion shall be so submitted to the Jury: Provided always, that if after having obtained such certified copy the Court shall not be satisfied that the facts had been properly understood by the foreign Court to which the case was remitted, or shall on any ground whatsoever be doubtful whether the opinion so certified does correctly represent the foreign law as regards the facts to which it is to be applied, it shall be lawful for such Court to remit the said case, either with or without alterations or amendments, to the same or to any other such Superior Court in such foreign State as aforesaid and so from time to time as may be necessary or expedient.

(Court in which action depends to apply such opinion to the facts set forth in cases, &c.

3. If, in any action depending in any Court of a foreign country or State with whose Government Her Majesty shall have entered into a convention as above set forth, such Court shall deem it expedient to ascertain the law applicable to the facts of the case as administered in any part of Her Majesty's dominions, and if the foreign Court in which such action may depend shall remit to the Court in Her Majesty's dominions whose opinion is desired a case setting forth the facts and the questions of law arising out of the same on which they desire to have the opinion of a Court within Her Majesty's dominions, it shall be competent to any of the parties to the action to present a petition to such last mentioned Court, whose opinion is to be obtained, praying such Court to hear parties or their counsel, and to pronounce their opinion thereon in terms of this Act or to pronounce their opinion without hearing parties or counsel; and the Court to which such petition shall be presented shall consider the same, and if they think fit, shall appoint an early day for hearing parties or their counsel on such case, and shall pronounce the opinion upon the questions of law as administered by them which are submitted to them by the foreign Court; and in order to their pronouncing such opinion they shall be entitled

Courts in Her Majesty's dominions may pronounce opinion on case remitted by a foreign Court.

to take such further procedure thereupon as to them shall seem proper and upon such opinion being pronounced a copy thereof, certified by an officer of such Court, shall be given to each of the parties to the action by whom the same shall be required.

Interpretation
of term.

4. In the construction of this Act, the word "action" shall include every judicial proceeding instituted in any Court, Civil, Criminal or Ecclesiastical; and the words "Superior Courts" shall include, in England, the Superior Courts of Law at Westminster, the Lord Chancellor, the Lords Justices, the Master of the Rolls, or any Vice-Chancellor, the Judge of the Court of Admiralty, the Judge Ordinary of the Court for Divorce and Matrimonial Causes, and the Judge of the Court of Probate, in Scotland, the High Courts of Justiciary, and the Court of Session, acting by either of its divisions; in Ireland, the Superior Courts of Law at Dublin, the Master of the Rolls and the Judge of the Admiralty Court and in any other part of Her Majesty's dominions, the Superior Courts of Law or Equity therein; and in a foreign country or State, any Superior Court or Courts which shall be set forth in any such convention between Her Majesty and the Government of such foreign country or State.

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31 & 32 VIC. CAP. 37.

An Act to amend the law relating to documentary evidence in certain cases.

(25th June 1868.)

Preamble.

WHEREAS it is expedient to amend the law relating to evidence:
Be it enacted, as follows:

Short title

1. This Act may be cited for all purpose as "The Documentary Evidence Act, 1868."

Mode of proving
certain documents.

2. *Prima facie* evidence of any proclamation, order, or regulation issued before or after the passing of this Act by Her Majesty, or by the Privy Council, also of any proclamation, order, or regulation issued before or after the passing of this Act by or under the authority of any such Department of the Government or officer as is mentioned in the first column of the schedule hereto, may be given in all Courts of Justice, and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned; that is to say:

- (1.) By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation.
- (2.) By the production of a copy of such proclamation, order, or regulation purporting to be printed by the Government printer, or, where the question arises in a Court in any British Colony or possession, of a copy purporting to be

printed under the authority of the legislature of such *British Colony* or possession.

- (3.) By the production, in the case of any proclamation, order, or regulation issued by Her Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the clerk of the Privy Council, or by any one of the Lords or others of the Privy Council, and, in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connection with such department or officer.

Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing.

No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, or regulation.

3. Subject to any law that may be from time to time made by the legislature of any *British Colony* or possession, this Act shall be in force in every such Colony and possession.

Act to be in force in Colonies.

4. If any person commits any of the offences following, that is to say—

Punishment of forgery.

- (1.) Prints any copy of any proclamation, order, or regulation which falsely purports to have been printed by the Government printer, or to be printed under the authority of the legislature of any *British Colony* or possession, or tenders in evidence any copy of any proclamation, order, or regulation which falsely purports to have been printed as aforesaid, knowing that the same was not so printed: or
- (2.) Forges or tenders in evidence, knowing the same to have been forged, any certificate by this Act authorized to be annexed to a copy of, or extract from, any proclamation, order, or regulation;

he shall be guilty of felony, and shall on conviction be liable to be sentenced to penal servitude.

5. The following words shall in this Act have the meaning hereinafter assigned to them, unless there is something in the context repugnant to such constructions; (that is to say)—

Definition of terms.

“*British Colony* and Possession” shall, for the purposes of this Act, include the *Channel Islands*, the *Isle of Man*, and such territories as may for the time being be vested in Her Majesty by virtue

“*British Colony* and Possession.”

of any Act of Parliament for the Government of *India* and all other Her Majesty's dominions.

"Legislature" "Legislature" shall signify any authority other than the Imperial Parliament or Her Majesty in Council competent to make laws for any Colony or possession.

"Privy Council" "Privy Council" shall include Her Majesty in Council and the Lords and others of Her Majesty's Privy Council, or any of them, and any Committee of the Privy Council that is not specially named in the schedule hereto.

"Government Printer." "Government Printer" shall mean and include the printer to Her Majesty and any printer purporting to be the printer authorized to print the Statutes, Ordinances, Acts of State, or other public Acts of the legislature of any *British* Colony or possession, or otherwise to be the Government printer of such Colony or possession.

"Gazette." "Gazette" shall include the *London Gazette*, the *Edinburgh Gazette*, and the *Dublin Gazette*, or any of such Gazettes.

Act to be cumulative. 6. The provisions of this Act shall be deemed to be in addition to, and not in derogation of, any powers of proving documents given by any existing Statute or existing at Common Law.

SCHEDULE.

Column 1.	Column 2.
Name of Department or Officer.	Name of Certifying Officers.
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant Secretary of the Treasury.
The Commissioners for executing the office of Lord High Admiral.	Any of the Commissioners for executing the Office of Lord High Admiral or either of the Secretaries to the said Commissioners.
Secretaries of State ...	Any Secretary or Under-Secretary of State.
Committee of Privy Council for Trade.	Any member of the Committee of Privy Council for Trade or any Secretary or Assistant Secretary of the said Committee.
The Local Government Board ...	The President or an <i>ex-officio</i> member of the Local Government Law Board or any Secretary or Assistant Secretary of the said Board.

UNDER 58 VIC. CAP. 9.

COLUMN 1.	COLUMN 2.
Name of Department or Officer.	Name of Certifying Officers.
The Board of Agriculture.	The President or any member of the Board, or the Secretary of the Board, or any person authorised by the President to act on behalf of the Secretary of the Board.

48 & 49 VIC. CAP. 74.

An Act to amend the Law relating to taking Evidence by Commission in India and the Colonies, and elsewhere in Her Majesty's Dominions.

(14th August 1885.)

BE it enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This Act may be cited as the Evidence by Commission Act, 1885.

Short title.

2. Where in any civil proceeding in any court of competent jurisdiction an order for the examination of any witness or person has been made, and a commission, mandamus, order, or request for the examination of such witness or person is addressed to any court, or to any judge of a court, in India or the Colonies, or elsewhere in Her Majesty's dominions, beyond the jurisdiction of the court ordering the examination, it shall be lawful for such court, or the chief judge thereof, or such judge, to nominate some fit person to take such examination, and any deposition or examination taken before an examiner so nominated shall be admissible in evidence to the same extent as if it had been taken by or before such court or judge.

Power to courts to nominate examiner in civil proceedings.

3. Where in any criminal proceeding a mandamus or order for the examination of any witness or person is addressed to any court, or to any judge of a court, in India or the Colonies, or elsewhere in Her Majesty's dominions, beyond the jurisdiction of the court ordering the examination, it shall be lawful for such court, or the chief judge thereof, or such judge, to nominate any judge of such court, or any judge of an inferior court, or magistrate within the jurisdiction of such first-mentioned court, to take the examination of such witness or person, and any deposition or examination so taken shall be admissible in

Power in criminal proceedings to nominate judge or magistrate to take depositions.

evidence to the same extent as if it had been taken by or before the court or judge to whom the mandamus or order was addressed.

Application
of 22 Viet c
20, as to
conduct
money, &c., to
proceedings
under this Act.

4. The provisions of the Act passed in the twenty-second year of Her Majesty, chapter twenty, intituled "An Act to provide for " taking " evidence in suits and proceedings pending before tribunals in Her " Majesty's dominions in places out of the jurisdiction of such tribu- " nals " (which may be cited as the Evidence by Commission Act, 1859), as amended by this Act, shall apply to proceedings under this Act.

Amendment
of 22 Viet c.
20, as to costs.

5. The power to make rules conferred by section six of the Evidence by Commission Act, 1859, shall be deemed to include a power to make rules with regard to all costs of or incidental to the examination of any witness or person, including the remuneration of the examiner, if any, whether the examination be ordered pursuant to that Act or under this or any other Act for the time being in force relating to the examination of witnesses beyond the jurisdiction of the court ordering the examination.

Oath or
affirmation of
witness.

6. When pursuant to any such commission, mandamus, order, or request as in this Act referred to any witness or person is to be examined in any place beyond the jurisdiction of the court ordering the examination, such witness or person may be examined on oath, affirmation, or otherwise, according to the law in force in the place where the examination is taken, and any deposition or examination so taken shall be as effectual for all purposes as if the witness or person had been examined on oath before a person duly authorised to administer an oath in the court ordering the examination.

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DOCUMENTARY EVIDENCE ACT, 1882, 45 VIC. CAP. 9.

An Act to amend the Documentary Evidence Act, 1868, and other enactments relating to the evidence of documents by means of copies printed by the Government Printers.

(19th June 1882.)

WHEREAS by the Documentary Evidence Act, 1868, and enactments applying that act, divers proclamations, orders, regulations, rules, and other documents may be proved by the production of copies thereof purporting to be printed by the Government printer, and the Government printer is thereby defined to mean and include the printer to Her Majesty :

And whereas divers other enactments provide that copies of acts of Parliament, regulations, warrants, circulars, gazettes, and other documents shall be admissible in evidence if purporting to be printed

by the Government printer, or the Queen's printer, or a printer authorized by Her Majesty, or otherwise under the authority of Her Majesty :

And whereas it is expedient to make further provision respecting the printing of the copies aforesaid :

BE IT THEREFORE ENACTED, as follows :

1. This Act may be cited as the Documentary Evidence Act, 1882. Short title.
 2. Where any enactment, whether passed before or after the passing of this act, provides that a copy of any act of Parliament, proclamation, order, regulation, rule, warrant, circular, list, gazette, or document shall be conclusive evidence, or be evidence, or have any other effect, when purporting to be printed by the Government printer, or the Queen's printer, or a printer authorised by Her Majesty, or otherwise under Her Majesty's authority, whatever may be the precise expression used, such copy shall also be conclusive evidence, or evidence, or have the said effect (as the case may be) if it purports to be printed under the superintendence or authority of Her Majesty's stationery office. Documents printed under superintendence of stationery office receivable in evidence.
 3. If any person prints any copy of any act, proclamation, order, regulation, royal warrant, circular, list, gazette, or document which falsely purports to have been printed under the superintendence or authority of Her Majesty's stationery office, or tenders in evidence any copy which falsely purports to have been printed as aforesaid, knowing that the same was not so printed, he shall be guilty of felony, and shall, on conviction, be liable to penal servitude for a term not exceeding seven years, or to be imprisoned for a term not exceeding two years, with or without hard labour. Penalty for forgery.
 4. The Documentary Evidence Act, 1868, as amended by this act, shall apply to proclamations, orders, and regulations issued by the lord lieutenant or other chief Governor or Governors of Ireland, either alone or acting with the advice of the privy council in Ireland, as fully as it applies to proclamations, orders, and regulations issued by Her Majesty. Application of act to Ireland.
- In the same Act, the term "the privy council" shall include the privy council in Ireland, or any committee thereof.
- In the same Act, and in this Act, the term "the Government printer" shall include any printer to Her Majesty in Ireland and any printer printing in Ireland under the superintendence or authority of Her Majesty's stationery office.

ACT No. X of 1873.

(RECEIVED THE GOVERNOR-GENERAL'S ASSENT ON THE 8TH APRIL 1873.)

THE INDIAN OATHS ACT, 1873.

An Act to consolidate the law relating to Judicial Oaths, and for other purposes.

Preamble. WHEREAS it is expedient to consolidate the law relating to judicial oaths, affirmations and declarations, and to repeal the law relating to official oaths, affirmations and declarations; It is hereby enacted as follows:—

I.—Preliminary.

- Short title. 1. This Act may be called "The Indian Oaths Act, 1873."
- Local extent. It extends to the whole of British India, and, so far as regards subjects of Her Majesty, to the territories of Native Princes and States in alliance with Her Majesty;
- Commencement. And it shall come into force on the first day of May 1873.
2. [*Repealed by Act XII of 1873.*]
- Saving of certain oaths and affirmations. 3. Nothing herein contained applies to proceedings before Courts Martial, or to oaths, affirmations or declarations prescribed by any law which, under the provisions of the Indian Councils' Act, 1861, the Governor-General in Council has not power to repeal.

II.—Authority to administer Oaths and Affirmations.

- Authority to administer oaths and affirmations. 4. The following Courts and persons are authorized to administer, by themselves or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law:—
- (a) All Courts and persons having by law or consent of parties authority to receive evidence;
- (b) The Commanding Officer of any military station occupied troops in the service of Her Majesty: provided
- (1) that the oath or affirmation be administered within the limits of the station, and
- (2) that the oath or affirmation be such as a Justice of the Peace is competent to administer in British India,

III.—Persons by whom Oaths or Affirmations must be made.

5. Oaths or affirmations shall be made by the following persons:—

Oaths or affirmations to be made by—
Witnesses

(a) all witnesses, that is to say, all persons who may lawfully be examined, or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons or to receive evidence:

(b) interpreters of questions put to, and evidence given by, witnesses, and

interpreters:

(c) jurors.

jurors.

Nothing herein contained shall render it lawful to administer in a criminal proceeding an oath or affirmation to the accused person, or necessary to administer to the official interpreter of any Court, after he has entered on the execution of the duties of his office, an oath or affirmation that he will faithfully discharge those duties.

6. Where the witness, interpreter or juror is a Hindú or Muham-madan,

Affirmation by
Natives or by
persons object-
ing to oaths.

or has an objection to making an oath,

he shall, instead of making an oath, make an affirmation.

In every other case the witness, interpreter or juror shall make an oath.

IV.—Forms of Oaths and Affirmations.

7. All oaths and affirmations made under Section 5 shall be administered according to such forms as the High Court may from time to time prescribe.

Forms of
oaths and af-
firmations.

And until any such forms are prescribed by the High Court, such oaths and affirmations shall be administered according to the forms now in use.

Explanation.—As regards oaths and affirmations administered in the Court of the Recorder of Rangoon and the Court of Small Causes of Rangoon, the Recorder of Rangoon shall be deemed to be the High Court within the meaning of this section.

8. If any party to, or witness in, any judicial proceeding offers to give evidence on oath or solemn affirmation in any form common amongst, or held binding by, persons of the race or persuasion to which he belongs, and not repugnant to justice or decency, and not purporting to affect any third person, the Court may, if it thinks fit, notwithstanding any thing hereinbefore contained, tender such oath or affirmation to him.

Power of
Court to ten-
der certain
oaths.

9. If any party to any judicial proceeding offers to be bound by any such oath or solemn affirmation as is mentioned in Section 8, if such oath or affirmation is made by the other party to, or by

Court may ask
party or wit-
ness whether
he will make

oath proposed by opposite party. any witness in, such proceeding, the Court may, if it thinks fit, ask such party or witness, or cause him to be asked, whether or not he will make the oath or affirmation:

Provided that no party or witness shall be compelled to attend personally in Court solely for the purpose of answering such question.

Administra-
tion of oath if
accepted.

10. If such party or witness agrees to make such oath or affirmation, the Court may proceed to administer it, or if it is of such a nature that it may be more conveniently made out of Court, the Court may issue a Commission to any person to administer it, and authorize him to take the evidence of the person to be sworn or affirmed and return it to the Court.

Evidence
conclusive as
against person
offering to be
bound.
Procedure in
case of refusal
to make oath.

11. The evidence so given shall, as against the person who offered to be bound as aforesaid, be conclusive proof of the matter stated.

12. If the party or witness refuses to make the oath or solemn affirmation referred to in Section 8, he shall not be compelled to make it, but the Court shall record, as part of the proceedings, the nature of the oath or affirmation proposed, the facts that he was asked whether he would make it, and that he refused it, together with any reason which he may assign for his refusal.

h. 1.—Miscellaneous.

Proceedings
and evidence
not invalidated
by omission of
oath or irregu-
larity.

13. No omission to take any oath or make any affirmation, no substitution of any one or any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth. See the Queen's case, 2 Br. and Bing., 284.

Persons giving
evidence bound
to state the
truth.

14. Every person giving evidence on any subject before any Court or person hereby authorized to administer oaths and affirmations shall be bound to state the truth on such subject.

Amendment
of Penal Code,
Sections 178 &
191.

15. ~~The~~ Indian Penal Code, Sections 178 and 181, shall be construed as if, after the word "oath," the words "or affirmation" were inserted.

Official oaths
abolished.

16. Subject to the provisions of Sections 3 and 5, no person appointed to any office shall, before entering on the execution of the duties of his office, be required to make any oath, or to make or subscribe any affirmation or declaration whatever.

ACT No. XVIII OF 1891.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor-General on the 1st October 1891.)

AN ACT TO AMEND THE LAW OF
EVIDENCE WITH RESPECT TO
BANKERS' BOOKS.

WHEREAS it is expedient to amend the Law of Evidence with respect to Bankers' Books; it is hereby enacted as follows:—

1. (1) This Act may be called the Bankers' Books Evidence Act, 1891. Title, extent & commencement.
(2) It extends to the whole of British India; and
(3) It shall come into force at once.
2. In this Act, unless there is something repugnant in the subject or context,— Definitions.
 - (1) "Company" means a company registered under any of the enactments relating to companies from time to time in force in British India, or incorporated by an Act of Parliament or of the Governor-General in Council, or by Royal Charter or Letters Patent;
 - (2) "bank" and "banker" mean—
 - (a) any company carrying on the business of bankers;
 - (b) any partnership or individual to whose books the provisions of this Act shall have been extended as hereinafter provided;
 - (c) any post office savings bank or money order office: [Act I of 1893]
 - (3) "bankers' books" include ledgers, day-books, cash-books, account-books and all other books used in the ordinary business of a bank;
 - (4) "legal proceeding" means any proceeding or inquiry in which evidence is or may be given, and includes an arbitration;
 - (5) "the Court" means the person or persons before whom a legal proceeding is held or taken;
 - (6) "Judge" means a Judge of a High Court;
 - (7) "trial" means any hearing before the Court at which evidence is taken; and
 - (8) "certified copy" means a copy of any entry in the books of a bank, together with a certificate written at the foot of such copy that it is a true copy of such entry; that

such entry is contained in one of the ordinary books of the bank, and was made in the usual and ordinary course of business: and that such book is still in the custody of the bank, such certificate being dated and subscribed by the principal accountant or manager of the bank with his name and official title.

Power to extend provisions of Act

3. The local Government may, from time to time, by notification in the official Gazette, extend the provisions of this Act to the books of any partnership or individual carrying on the business of bankers within the territories under its administration, and keeping a set of not less than three ordinary account books, namely, a cash-book, a day-book or journal and a ledger, and may in like manner rescind any such notification.

Mode of proof of entries in bankers' books.

4. Subject to the provisions of this Act, a certified copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie* evidence of the existence of such entry, and shall be admitted as evidence of the matters, transactions and accounts therein recorded in every case where, and to the same extent as, the original entry itself is now by law admissible, but not further or otherwise.

Case in which officer of bank not compellable to produce books.

5. No officer of a bank shall in any legal proceeding to which the bank is not a party be compellable to produce any bankers' book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions and accounts therein recorded, unless by order of the Court or a Judge made on special cause.

Inspection of books by order of Court or Judge.

6. (1) On the application of any party to a legal proceeding, the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceeding, or may order the bank to prepare and produce, within a time to be specified in the order, certified copies of all such entries, accompanied by a further certificate that no other entries are to be found in the books of the bank relevant to the matters in issue in such proceeding, and such further certificate shall be dated and subscribed in manner hereinbefore directed in reference to certified copies.

(2) An order under this or the preceding section may be made either with or without summoning the bank, and shall be served on the bank three clear days (exclusive of bank holidays) before the same is to be obeyed, unless the Court or Judge shall otherwise direct.

- (3) The bank may at any time before the time limited for obedience to any such order as aforesaid either offer to produce their books at the trial or give notice of their intention to show cause against such order, and thereupon the same shall not be enforced without further order
7. (1) The costs of any application to the Court or a Judge under or for the purposes of this Act and the costs of any thing done or to be done under an order of the Court or a Judge made under or for the purposes of this Act shall be in the discretion of the Court or Judge, who may further order such costs or any part thereof to be paid to any party by the bank if they have been incurred in consequence of any fault or improper delay on the part of the Bank Costs.
- (2) Any order made under this section for the payment of costs to or by a bank may be enforced as if the bank were a party to the proceeding.
- (3) Any order under this section awarding costs may, on application to any Court of Civil Judicature designated in the order, be executed by such Court as if the order were a decree for money passed by itself:

Provided that nothing in this sub-section shall be construed to derogate from any power which the Court or Judge making the order may possess for the enforcement of its or his directions with respect to the payment of costs.

ACT No. V OF 1899

(RECEIVED IN THE SECRETARY'S OFFICE OF THE GOVERNOR-GENERAL
ON THE 10th FEBRUARY 1899)

AN ACT TO FURTHER AMEND THE
INDIAN EVIDENCE ACT, 1872.

- WHEREAS it is expedient to amend the Indian Evidence Act, 1872. [I of 1872], it is hereby enacted as follows:—

Short title and
commence-
ment

1. (1) This Act shall be called the Indian Evidence Act, 1899; and
(2) It shall come into force at once.

Addition to
section 37, Act
I, 1872

2. To section 37 of the Indian Evidence Act, 1872 [I of 1872], the following shall be added, namely:—

“This section applies also to any Act of the Lieutenant-Governor in Council of the North-Western Provinces and Oudh, the Punjab or Burma.”

Amendment of
section 45, and
addition to sec-
tion 73, Act I,
1872

3. (1) In section 45 of the said Act, as amended by section 4 of the Indian Evidence Act (XVII of 1872) Amendment Act, after the word “handwriting,” at the end of the second line in which it occurs, the words “or finger-impressions” shall be inserted.

- (2) To section 73 of the said Act the following shall be added, namely:—

“This section applies also, with any necessary modifications, to finger-impressions.”

Amendment of
section 86, Act
I, 1872

4. In section 86 of the said Act, as amended by section 8 of the Indian Evidence Act (1872) Amendment Act, 1891 [III of 1891], for the second paragraph the following shall be substituted, namely:—

“An officer who, with respect to any territory or place not forming part of Her Majesty's dominions, is a Political Agent therefor, as defined in section 3, clause (4), of the General Clauses Act, 1897, [X of 1897], shall, for the purposes of this section, be deemed to be a representative of the Government of India in and for the country comprising that territory or place.”

Partial repeal
of section 8,
Act III, 1891

5. In section 8 of the Indian Evidence Act (1872) Amendment Act, 1891 [III of 1891], the words and figures from “and to the same” to the end of the section are hereby repealed.

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[NOTE. -*Intr.* means *Introduction*, and *Ap.* *Appendix*]

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